SUPREME COURT OF THE UNITED STATES.

No. 168.

JOSHUA BARRELL, APPELLANT,

vs.

THE PROPELLER "MOHAWK," THE WESTERN TRANSPORTATION COMPANY, CLAIMANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the Circuit Court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. David Davis, one of the justices of the Supreme Court of the United States presiding, and the Hon. Thomas Drummond, district judge of said District Court, associate, judges of said Circuit Court, on Monday, the tenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the ninetieth.

WM. H. BRADLEY, *Clerk.*

Appeal from the District Court.

THE CHICAGO MARINE AND FIRE INSURANCE Company, David Douse, Ammi Douse, and John D. Muir, *vs.* THE PROPELLER MOHAWK. } In admiralty.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twelfth day of October, in the year of our Lord one thousand eight hundred and sixty-three, came The Chicago Marine and Fire Insurance Company, libellant, by Robert Rae, esq., its proctor, and filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in said district, its transcript of a record from the District Court of the United States for the northern district of Illinois, in admiralty, which said transcript is in the words and figures following, to wit:

Pleas in the District Court of the United States of America for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, judge of said District Court, on Wednesday, the thirtieth day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-eighth year.

WM. H. BRADLEY, *Clerk.*

THE CHICAGO MARINE AND FIRE INSURANCE Company *vs.* PROPELLER MOHAWK. } In admiralty.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the first day of August, in the year of our Lord one thousand eight hundred and sixty-two, The Chicago Marine and Fire Insurance Company, libellant, by Robert Rae, esq., its proctor, filed in the office of the clerk of the District Court of the United States for the northern district of Illinois, at Chicago, in said district, its libel against the propeller Mohawk, respondent. Also, at the same time, filed its stipulation for costs in said cause;

which said libel and stipulation are in the words and figures following, to wit:

2 *Libel.*

To the honorable Thomas Drummond, judge of the United States District Court for the northern district of Illinois, in admiralty:

The libel of the Chicago Marine and Fire Insurance Company, created by the laws of the State of Illinois, and existing in the district aforesaid, against the propeller Mohawk, her engines, boilers, machinery, boats, tackle, apparel, and furniture, in a cause of contract of affreightment, civil and maritime, alleges as follows:

First. That the propeller Mohawk, now lying at Chicago in the district aforesaid, is a vessel of more than twenty tons burthen, and at the time when the cause of action hereinafter stated and set forth arose was, and is, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and the navigable waters connecting the same.

Second. That on or about the 31st day of October, A. D. 1860, the Chicago Marine and Fire Insurance Company, libellant aforesaid, shipped on board the propeller Mohawk, then lying in the port of Chicago, in the State of Illinois, "the said propeller then being a common carrier," ten thousand bushels of number one spring wheat, to be transported and conveyed on board said propeller from the port of Chicago, in the State of Illinois, to the port of Buffalo, in the State of New York, and to be delivered by the said propeller Mohawk safely at said port of Buffalo to the consignee of said libellant, upon paying the freight of fifteen cents per bushel for each and every bushel so delivered as aforesaid, according to the tenor and effect of the bill of lading made, signed, and delivered by the agent of said propeller Mohawk to said libellant in the premises, a copy of which is hereunto annexed, and which libellant prays may be taken as part of this libel.

Third. That said cargo of ten thousand bushels of wheat was at the time it was delivered by the libellant on board said propeller Mohawk, as aforesaid, in good condition, and of the value of about ten thousand dollars. That said wheat was, at the time of its delivery to said propeller for transportation as aforesaid, the property of libellant, and of the value above stated.

Fourth. That said wheat was not carried and transported by said propeller Mohawk from said port of Chicago to the said port of Buffalo, nor was the same, nor any part thereof, delivered at Buffalo to the consignee of libellant, or to any person or persons for libellant, but, on the contrary, the said wheat, whilst on board the propeller and in the possession, custody, and care of the officers of said propeller, became and was wholly lost to libellant.

Fifth. That said wheat was not carried and transported by said propeller Mohawk from said port of Chicago to the said port of Buffalo; that by reason of the said failure of the said propeller to deliver

said wheat as aforesaid at Buffalo, according to the obligations of said bill of lading, and by reason of the loss aforesaid, libellant has suffered damage to the full amount of the value of said wheat,
3 to wit, the sum of ten thousand dollars, for which the said li-
libellant claims compensation of and from the owner of said propeller Mohawk, but that said owner of said propeller denies any and all liability for and on account of said loss, and refuses to make any satisfaction for said loss, although by libellant often requested so to do.

Sixth. That there is now due and unpaid libellant, from said owner, the sum of ten thousand dollars, for and on account of said contract of affreightment.

Seventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court, whereupon the libellant prays that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said propeller Mohawk, her engines, boilers, machinery, boats, tackle, apparel, and furniture, and that the said owner and all persons claiming any right, title, and interest in the said propeller Mohawk may be cited to appear and answer upon oath all and singular the matters aforesaid; and that the said vessel may be condemned and sold to pay the amount due to the libellant, with interest and costs, and that the libellant may have such other and further relief as in law or justice he may be entitled to receive.

CHICAGO M. & F. INSURANCE CO.,
By R. RAE, *Proctor.*
JOSHUA BARRELL.

Sworn and subscribed before me this 1st day of Aug., A. D. 1862.
P. A. HOYNE, *U. S. Com'r.*

CHICAGO, *Oct.* 31*st*, 1860.

Shipped in good order and condition, by N. K. Fairbank, as agent and forwarder, for account and at the risk of whom it may concern, on board the propeller Mohawk, whereof Pheatt is master, the following articles as here marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, the dangers of navigation, fire, and collision excepted. In witness whereof, the said master of said vessel hath affirmed to bills of lading of this tenor and date; one of which being accomplished, the other to stand void.

10,000 bushels of sp'g wheat, ac't Chicago Marine and Fire Insurance Co. Care J. D. Sawyer, Buffalo. Freight to Buffalo, 15 cts.
(Signed) JON. W. TUTTLE, *Ag't.*

Indorsed: Filed Aug. 1st, 1862. Wm. H. Bradley, cl'k.

Libellant's stipulation.

District Court, September term, A. D. 1862.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss*:

Whereas a libel was filed in this court on the first day of August, A. D. 1862, by the Chicago Marine and Fire Insurance Company against the propeller Mohawk, her engines, machinery, &c., boats, tackle, apparel, and furniture, for the reasons and causes in the said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the libellant; and the said libellant, Jonathan Barrell, and Robert Rae, surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or their surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellant above-named shall pay all such costs as shall be awarded against by this court, or, in case of appeal, by the Appellate Court.

JOSHUA BARRELL.
R. RAE.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

R. Rae, party to the above stipulation, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

R. RAE.

Sworn this 1st day of August, A. D. 1862, before me.
P. A. HOYNE, *U. S. Com'r.*

Indorsed: Filed Aug. 1st, A. D. 1862. Wm. H. Bradley, clerk.

Whereupon a monition issued out of said clerk's office against said respondent, which said monition is in the words and figures following, to wit:

Monition.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss*:

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas a libel hath been filed in the District Court of the United States in and for the northern district of Illinois, on the first day of August, in the year of our Lord one thousand eight hundred and sixty-two, by the Chicago Marine and Fire Insurance Company against the propeller Mohawk, her engines, boilers, machinery, boats,

tackle, apparel, and furniture, for reasons and cause in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons having or pretending to have any right, title, or interest therein may be cited to appear and answer all and singular the matters in said libel articulately propounded, and that this court would be pleased to annonnce for the sum of ten thousand dollars, the damages alleged in said libel, besides costs of suit: You are therefore commanded to attach the said propeller Mohawk, her engines, boilers, machinery, boats, tackle, apparel, and furniture, and to detain the same in your custody until the further order of this court respecting the same, and to give due notice by publication in some daily newspaper printed in the city of Chicago for fourteen days previous to the day of trial and by notice posted up in the most public manner for the space of fourteen days at or near the place of trial, of such seizure and libel to all persons claiming the said propeller Mohawk, her engines, boilers, machinery, boats, tackle, apparel, and furniture, or knowing or having anything to say why this court should not pronounce against the same according to the prayer of the said libel; and that they be and appear before the said court to be held in and for the northern district of Illinois, at the United States court-room, in the city of Chicago, in said district, on the first Monday in September next, if that be a day of jurisdiction; if not, then on the first day of jurisdiction thereafter, at 10 o'clock in the forenoon of that day, then and there to interpose a claim for the same, and to make their allegations in that behalf; and what you shall have done in the premises, do you then and there make return, together with this writ.

Witness the honorable Thomas Drummond, judge of said court, this first day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the 87th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

By virtue of the within writ, I have on this 1st day of August, A. D. 1862, attached the within-named propeller Mohawk, and have on the same day released said propeller from custody, by order of R. Rae, libellants' proctor.

Bond herewith returned.

J. R. JONES, *U. S. Marshal.*
By GEO. L. WEBB, *Deputy.*

Indorsed: Filed this 8th day of Oct., A. D. 1862. Wm. H Bradley, clerk.

Bond.

On the same day, to wit, the eighth day of October, A. D. 1862, the bond for release of said respondent was filed in said clerk's office, which said bonds, together with the endorsements thereon and the appearance of claimant thereto attached, is in the words and figures following, to wit:

Know all men by these presents that we, The Western Transportation Company as principal, and Dean Richmond, of Batavia, in the State of New York, and Jonathan W. Tuttle, as sureties, are held and firmly bound unto The Chicago Marine and Fire Insurance Company in the sum of twenty thousand dollars lawful money of the United States of America, to be paid to the said The Chicago Marine and Fire Insurance Company, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, 6 our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated the fifteenth day of August, one thousand eight hundred and sixty-two.

Whereas in a certain cause of civil and maritime moved and prosecuted in the District Court of the United States of America for the northern district of Illinois, on behalf of the above-named obligees, against the ship or vessel called the propeller Mohawk, her boats, tackle, apparel, and furniture, a warrant of arrest has been issued out of the said court against the said ship or vessel, boats, tackle, apparel, and furniture, in virtue of which said warrant the said ship or vessel, her tackle, apparel, and furniture have been arrested by J. R. Jones, one of the deputies of the marshal of the said district, and are now in his custody: Now, therefore, the condition of the above obligation is such, that if The Western Transportation Company, the claimant of the said ship or vessel, her boats, tackle, apparel, and furniture, shall well and truly abide and answer the decree of the said court in the aforesaid cause, without fraud or delay, then the above obligation to be void; otherwise it shall remain in full force and virtue.

THE WESTERN TRANSPORTATION CO.,
[SEAL.] By JNO. ALLEN.
[SEAL.] DEAN RICHMOND.
[SEAL.] JNO. W. TUTTLE.

NORTHERN DISTRICT OF NEW YORK, *Erie County, ss:*

I hereby certify that on this fifteenth day of August, 1862, before me came the above-named Dean Richmond, to me known to be the same person described in and who executed the above bond, and acknowledged that he had executed the same for the purposes therein mentioned; and being by me duly sworn, the said Dean Richmond made oath that he has property in the State of Illinois and within the northern district thereof, worth forty thousand dollars, over and above all incumbrances thereon. And on the same day came before me John Allen, junior, to me known, and made oath that he is the president of the Western Transportation Company, the principal in the foregoing bond, and that the seal affixed thereto is the corporate seal of the said The Western Transportation Company, and was affixed thereto by the authority of the board of directors of said company, and that by the like authority he did subscribe the

name of the said company thereto and his own name, as president thereof, for the purposes therein expressed.

P. G. PARKER, *U. S. Commissioner.*

Approved by—

R. RAE, *Proctor.*

Approved:

THOMAS DRUMMOND.

The Western Transportation Company, owners of the said propeller Mohawk, come, and by George C. Bates, their proctor and advocate, enter a general appearance in said cause, Sept. 25th, 1862.

GEO. C. BATES,
Proctor and Advocate.

Indorsed: Filed Oct. 8th, 1862. Wm. H. Bradley, cl'k.

On this day, to wit, the twentieth day of October, A. D.
7 1862, came The Western Transportation Company, by its proctor, and filed in said clerk's office its answer and its stipulation in said cause, which said answer and stipulation are in the words and figures following, to wit:

United States District Court, northern district of Illinois, in admiralty.

Answer.

To the honorable Thomas Drummond, judge of the district court of the United States in and for the northern district of Illinois:

The answer of The Western Transportation Company, claimant and respondent, to the libel and complaint of The Chicago Fire and Marine Insurance Company, of Chicago, against the propeller Mohawk, her boilers, boats, tackle, apparel, and furniture, heretofore exhibited and filed in this court in a cause of contract, civil and maritime, alleges and propounds as follows:

First. That it, the said respondent, is a corporation created, organized, and existing under the laws of the State of New York, and now is, and was at the several times in the said libellant's complaint mentioned, the owners of the said propeller Mohawk, her engine, boats, tackle, apparel, and furniture.

Second. And as the several matters and things stated and charged in the first article of said libel, the respondent admits that the said propeller was, at the several times in the said libel mentioned, enrolled and licensed for the coasting trade on the lakes, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States and the navigable waters connecting the same.

Third. And as to the several matters and things stated and charged in the second article of the said libel, the respondent denies the same, and each and every part thereof, in manner and form as the same are

therein stated and charged, except in so far as the same are hereinafter admitted to be true or are consistent with the facts hereinafter stated.

Fourth. And as to the several matters and things in the third article of the said libel stated and charged; the said respondent admits that on or about the day mentioned in said libel, there was delivered on board the said propeller Mohawk, for transportation from Chicago to Buffalo, ten thousand bushels of wheat, at the freight of fifteen cents per bushel; that the same was in good condition and of the value of about ten thousand dollars; and as to each and every other matter or thing in the said third article stated and charged, the respondent denies the same, in manner and form as the same are therein stated and set forth.

Fifth. And as to several matters and things in the fourth article of the said libel stated and charged, the respondent admits that the wheat was not carried from Chicago to Buffalo, nor was the same delivered at Buffalo to the consignee of the libellant, or to any
8 person or persons at Buffalo for the libellants, but the respondent denies that the said wheat, or any portion thereof, became lost to the libellants while on board the propeller and in the custody, possession, and care of the officers of the said propeller. On the contrary thereof the respondent says that the said propeller and the officers thereof were prevented from carrying the said wheat to the place of destination and there delivering the same by the act of the said libellants, as is hereinafter particularly stated and set forth and that the officers of the propeller delivered all of said wheat at a place short of the place of destination to a person claiming and having title thereto, from and through the libellants, and that such delivery was so made with the knowledge, consent, direction and concurrence of the said libellants.

Sixth. And as to the several matters and things in the fifth article of said libel contained, the respondent denies the same, and each and every part thereof, in manner and form as the same are therein stated and set forth; except that it denies any and all liability for said pretended loss, and refuses to make any satisfaction therefor to the libellants.

Seventh. And as to the several matters and things in the sixth article of said libel stated and charged, the respondent denies the same, and each and every part thereof, in manner and form as the same are therein stated and charged.

Eighth. And as to the several matters and things in the seventh article of said libel contained, the respondent denies the same, and each and every part thereof, in manner and form as the same are therein stated and set forth.

Ninth. And further answering the said libel and complaint, the respondent says that the wheat mentioned in the said libel and in the bill of lading therein set forth and referred to, was, on or about the day mentioned in the said libel, shipped on board the said propeller Mohawk, which was then lying at Chicago aforesaid, and destined on a trip or voyage from Chicago to Buffalo, by one Isaac Sherwood,

who was then the owner thereof, under a certain contract of affreightment then and there made between the said Sherwood and the said respondent, its officers and agents, at Chicago aforesaid, in and by which said contract the said respondent undertook and agreed to carry and transport the said wheat on board the said propeller from Chicago to Buffalo, at the rate of freight specified in the bill of lading set forth in the said libel, and there delivered the same to the said Sherwood, or to his order or assigns, upon payment of the freight and charges agreed to be paid therefor, dangers of navigation, fire, and collision excepted; that one N. K. Fairbanks, of the city of Chicago, having made certain advances of money to the said Sherwood, either upon his own account as principal, or on account of the said libellants, as agent, and which the said respondent is unable to state, it was then and there agreed by and between the said Sherwood and the said Fairbanks, that he, the said Fairbanks, or the person or persons on whose account such advance was made, should have a lien upon and control of the said
9 wheat for the purpose of securing the repayment of such advances; and thereupon the bill of lading in the libel set forth was, by the direction of the said Sherwood, made out and delivered to the said Fairbanks as security for such advances, and not otherwise, in order that he, the said Fairbanks, or the persons on whose account such advances had been made, might control the property or the avails thereof, for the purposes of such security. And the said respondent, further answering, says that the advances so made by the said Fairbanks and the said libellants, have been and were fully paid to the said libellants before the commencement of this suit, and that the interest of the said libellants in and to the said wheat was terminated before the commencement of this suit.

Tenth. And further answering the said libel and complaint, the respondent says that upon the said shipments having been so made as stated and set forth in the ninth article of this answer, the said Sherwood caused and procured the said wheat to be insured against the perils and dangers of navigation upon the said trip or voyage from Chicago to Buffalo aforesaid, by and in the Mutual Insurance Company, of Buffalo, a corporation created under the laws of the State of New York, and duly authorized to make insurance of this and the like character, and directed the loss, if any there should be, to be paid to the said Chicago Fire and Marine Insurance Company, all of which was done as further security for the advances in the ninth article of this answer mentioned and referred to.

Eleventh. And, further answering, the respondent says that the said propeller Mohawk, on or about the thirty-first day of October, one thousand eight hundred and sixty, left the said port of Chicago for Buffalo aforesaid, on her said trip or voyage, being then in all respects tight, staunch, strong, and seaworthy, and while in the successful prosecution of her said voyage, in the evening of the sixth of November, one thousand eight hundred and sixty, was, by the perils and dangers of navigation, and not otherwise, and without fault of the said propeller, her officers or crew, or any or

either of them, stranded and grounded upon St. Clair flats, and then and there became temporarily disabled by reason of and in consequence of such stranding, and was compelled to suspend the further prosecution of the said voyage for the time being, and until the necessary repairs to enable the said propeller to proceed upon and to complete her said voyage could be made. And further answering, the said respondent says that the person named in the said bill of lading to whose care the said wheat was consigned at Buffalo, that is to say, the said James D. Sawyer, acting as the agent of the said libellants and of the said Sherwood, immediately upon being informed of the accident to and detention of the said propeller, as hereinbefore mentioned, did, for and on account of the said libellants, and for and on account of the owners of the said wheat, whose interest was covered by the insurance hereinbefore mentioned, abandon the same to the insurers thereon, that is to say, to the Mutual Insurance Company, of Buffalo, and claimed as for a total loss under the said insurance so made as aforesaid. And thereupon the said insurers, that is to say, the said The Mutual Insurance Company, of Buffalo, did then and there accept the said abandonment so made as aforesaid, and did then and there pay to the said libellants, and to the said Sherwood, the amount for which the said wheat was so insured as aforesaid. And the said The Mutual Insurance Company, of Buffalo, thereby became and was the owner of the said wheat mentioned in the said libel and in the bill of lading therein set forth. And thereupon the said The Mutual Insurance Company, of Buffalo, did, with the assent of the said libellants and of the said Sherwood, assume to be the owner of the said wheat and each and every part thereof. And the said respondent further says, that from and after the said abandonment and the acceptance thereof, the said propeller and the officers thereof, and the said respondent, held the said wheat as the bailees of the said The Mutual Insurance Company, of Buffalo, and did thereafter deliver to it, the said The Mutual Insurance Company, of Buffalo, the wheat mentioned in the said bill of lading, and each and every part thereof; all of which was well known to the said libellants, and all of which was done with the knowledge, consent, concurrence, and approbation of the said libellants, and of the said Sherwood.

Twelfth. And further answering, the said respondent says that the detention of the said propeller in consequence of the said accident and misfortune was of temporary character, and that within a few days after the said occurrence the said propeller was got off and taken to Detroit, a distance of about thirty miles from the place of the accident, and was subsequently taken from Detroit to Buffalo, where she arrived before the close of navigation for the then present season, and within two weeks from the time of the accident. And the respondent further says that the place of the accident and detention was directly in the track of all the vessels engaged in navigating the lakes between the port of Detroit and the upper lakes, and that the said wheat, all of which remained on board the said propeller, could have been readily transhipped and sent forward to

Buffalo by other vessels in case it should have been found impracticable to have sent the same forward in the said propeller, and the said respondent would have so done but for the actings and doings of the said libellants and The Mutual Insurance Company of Buffalo, as herein set forth.

Thirteenth. And further answering, the respondent says that the wheat mentioned in the said libel and complaint was shipped on board the said propeller at the same time and in connexion with a certain other quantity of wheat, consisting of ten thousand bushels of the same character and value with that mentioned in the libel, and that the two parcels were not separated, and that the two parcels or quantities of wheat were each of them insured by and in the said The Mutual Insurance Company of Buffalo, and were both consigned to the care of the same person at Buffalo, as the agent of the libellants, of the respective owners and consignees of the said two parcels of wheat; that upon the occurrence of the before-mentioned accident, the person to whom the same were consigned, being the said James D. Sawyer named in the said bill of lading, acting as the agent of the
11 said libellant and as the agent of the owner of the other parcel, abandoned each separate parcel of wheat to the said insurance company, and the said insurance company did then and there accept the said abandonment of each of the said parcels and quantities of wheat; and thereupon the said insurance company, having accepted the said abandonment, did sell the said wheat, which had been so abandoned to it as aforesaid, to a certain person at the city of Detroit, that is to say, one F. N. Phelps, and did then and there require the master of the said propeller to deliver the said wheat from the said propeller to the said purchaser thereof; and thereupon the master of the said propeller did deliver to the said purchaser, at the place of such detention, eight thousand bushels of the said wheat, and upon the arrival of the said propeller at Detroit, within a few days thereafter, the master thereof delivered to the said purchaser the further quantity of eleven thousand and ninety bushels of the said wheat so abandoned, making all of the wheat included in the two shipments in this article mentioned, (of which the wheat in the libel mentioned is part and parcel,) except that eleven hundred bushels of wheat taken from the said two parcels before the said sale by the insurance company had been consummated, had been sent forward to the place of destination by the respondent by another vessel. And further answering, the respondent says that the wheat mentioned in the libel was part and parcel of the wheat so delivered to the purchaser from the said insurance company, and that the same was so delivered under and by virtue of the said abandonment, with the knowledge, concurrence, and consent of the libellants; and that by reason of the actings and doings aforesaid on the part of the said libellants and of the said Mutual Insurance Company, it was prevented from carrying the said wheat to the place of destination, as it otherwise might and could and would have done, and that all the said wheat mentioned in the said libel was so delivered to the said purchaser from the said insurance company, except the proportion of

the eleven hundred bushels so forwarded as aforesaid, which was and is about five hundred and fifty bushels, and that the said wheat so forwarded has not been delivered to the said libellants or any other person, for the reason that neither the said libellants nor any other person or persons has paid, or offered to pay, the freight due to the said respondent under and by virtue of the said contract and bill of lading, nor any part thereof, and that the said respondent has and does retain the same as security for the payment of such freight.

Fourteenth. And the respondent further says, that at the time of the accident to the said propeller hereinbefore mentioned the said trip or voyage had been more than half completed and performed, and that the said wheat had been carried more than half the distance embraced in the said voyage, and that neither at the time of the said abandonment and the acceptance thereof by the said insurance company, nor at any other time, has the libellants, or any other person or persons, paid to the respondent, or to its officers or agents, the freight agreed to be paid for the transportation thereof, and in the said bill of lading stipulated and provided for; nor has any part thereof
12 been paid or offered to be paid. And the respondent, in fact, further says, that the said abandonment was so made without its consent or knowledge, and solely at the instance of the said libellants, and the same was so accepted by the insurance company without the consent or knowledge of the respondent. And the respondent in fact further says, that in making the delivery of the said wheat to the said insurance company it did not waive or release its right to the payment of the freight stipulated for in the bill of lading, nor to any part thereof; that the delivery of the said wheat to the said insurance company, and to the purchaser from and under it, was at the request of the said company, and the same was voluntarily accepted by the said insurance company and the said purchaser, and not otherwise.

Fifteenth. And the respondent in fact further says, that of the said two parcels of wheat hereinbefore mentioned there remains in the hands of the said respondent eleven hundred and fifty bushels thereof, and that the same is detained by the respondent as security for the payment of the freight upon the said two parcels, so far as the same will go, and that the respondent has no other security for the payment of the said freight.

Wherefore the respondent prays that this honorable court will be pleased to pronounce against the claim of the libellants, and that the said libel may be dismissed with costs.

And the respondent further prays that this honorable court will be pleased to decree, decide, and adjudge, that the libellants, by reason of the premises and the various matters hereinbefore stated, is liable to pay to the said respondent the freight stipulated in the bill of lading in the said libel mentioned, and that the said respondent may have judgment therefor, and that the same may be enforced by process issuing out of and under the seal of this honorable court.

THE WESTERN TRANSPORTATION COMPANY.
By JNO. ALLEN, JR., *President.*

UNITED STATES OF AMERICA, *Northern district of New York:*

On this 10th day of October, 1862, personally appeared before me John Allen, junior, of the city of Buffalo, in the district aforesaid, and made oath that he is the president of the Western Transportation Company, the respondent named in the foregoing answer; that he has read the same, and knows the contents thereof; that the case in this action and facts stated in said answer are better known to the said deponent than any other officer or agent of the respondent, and that the said answer is true in substance and matter of fact.

P. G. PARKER, *U. S. Commissioner.*

Indorsed: Filed Oct. 20th, 1862. Wm. H. Bradley, cl'k.

District Court, November term, A. D. 1862.

13 *Claimant's stipulation.*

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

Whereas a libel was filed in this court on the day of, , A. D. 1862, by the Chicago Fire and Marine Insurance Company against the propeller Mohawk, her engines, boats, tackle, apparel, and furniture, for the reasons and causes in the said libel mentioned; and whereas a claim has been filed in the said cause by the Western Transportation Company, and the said Western Transportation Company and Bohan S. Shepard, its surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or their surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all such costs as shall be awarded against it by this court, or, in case of appeal, by the Appellate Court.

THE WESTERN TRANSPT. CO.,
By JON. W. TUTTLE, *Agent.*
BOHAN S. SHEPHARD.

Taken and acknowledged this 18th day of October, A. D. 1862, before me.

NORTHERN DISTRICT OF ILLINOIS,
State of Illinois, Cook County, City of Chicago, ss:

Bohan S. Shepard, party to the above stipulation, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all debts and liabilities. BOHAN S. SHEPARD.

Sworn this twentieth day of October, A. D. 1862, before me.
Witness my hand and notarial seal.
[SEAL.] CHARLES A. GREGORY,
Notary Public.

Indorsed: Filed Oct. 20th, A. D. 1862. Wm. H. Bradley, clerk.

On this day, to wit, the fifteenth day of June, in the May term, A. D. 1863, of said court, in the record of the proceedings thereof in said-entitled cause, is the following entry, to wit:

Record entry.

CHICAGO MARINE AND FIRE INSURANCE COMPANY
vs.
PROPELLER MOHAWK. } Libel.

Now come the parties, by their proctor, and thereupon comes on to be heard the motion of the respondent on affidavit filed to
14 dismiss this cause; after argument, the court takes said motion under advisement.

On the next day, to wit, the sixteenth day of June, in the year and the term of said court last aforesaid, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Record entry.

CHICAGO MARINE AND FIRE INSURANCE COMPANY
v.
PROPELLER MOHAWK. } Libel.

The court having considered, and being now fully advised, on the motion heretofore submitted to dismiss this cause, overrules the same.

On this day, to wit, the twenty-second day of June, in the May term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

CHICAGO MARINE AND FIRE INSURANCE COMPANY
v
PROPELLER MOHAWK. } Libel.

On motion of the libellant's proctor, R. Rae, esq., leave is given to amend the libel.

On this day, to wit, the twenty-third day of June, A. D. 1863, came said libellant, by R. Rae, esq., its proctor, and filed in said clerk's office its amendment to libel; which said amendment is in the words and figures following, to wit:

U. S. dist. court, N. dist. of Ills., in admiralty.

Amendment.

CHICAGO FIRE AND MARINE INS. CO.
v.
PROPELLER MOHAWK. } Amendment to libel.

Libel amended so as to insert in the 4th line of article 2nd of said libel, before the words "ten thousand," the words "the said propeller then being a common carrier."

R. RAE, *Proctor for Libellant.*

Endorsed: Filed June 23d, 1863. Wm. H. Bradley, clerk.

Libellants' testimony.

Deposition of Jeremiah S. Sanders, taken at Detroit, in the State of Michigan, on the second day of May, A. D. 1863, before George W. Wolverton, notary public, in behalf of libellant; which is as follows, to wit:

I reside in the village of Newport, St. Clair county, Michigan. I am thirty-six years of age. My profession is that of United States buoy tender and pilot at the St. Clair flats. I know the St. Clair flats. I have been in the business of piloting propellers, tugs, and vessels of all kinds over said flats for the period of six years. I consider myself every way competent to judge of the proper and safe tracts of channel through which vessels should pass. I was well acquainted with the channel of the St. Clair flats on the 1st of November, A. D. 1860, and I knew the propeller Mohawk at that time, and knew pretty nearly how she could safely navigate the channel at that time. I was on board of her at the time she grounded, acting as pilot. Captain of the propellor, Captain Pheatte, and I stood on the pilot-house alone. The schooner Harriet Ross, about 600 feet from the lower end of the channel, lay at anchor across the channel. She was not sunk there, but waiting for a tug, which soon after arrived and towed her away. The wind caused her to trend across the channel. I advised the captain of the propeller Mohawk to run down his propeller slowly against the schooner Harriet Ross, and push her out of the way, as there was not sufficient depth of water to go round the schooner. Captain Pheatte insisted that there was water enough, and in making the attempt grounded. This happened on the St. Clair flats, about the 1st of November, 1860, about 1 o'clock a. m. The propeller while aground, and some two hours after, exploded her boiler and afterwards sunk. It was through no carelessness of mine. I knew the channel perfectly at the point where the schooner lay, and was satisfied that the propeller was running great danger by attempting to go round as she did.

JEREMIAH S. SANDERS.

Sworn and subscribed before me this second day of May, A. D. 1863.

[SEAL.] GEO. W. WOLVERTON,
Notary Public.

Indorsed: Filed May 6th, 1863. WM. H. Bradley, cl'k. Opened for Mr. Rae, proctor, June 6th, 1863. Wm. H. Bradley, cl'k.

The deposition of John W. Strong, taken at Detroit, Michigan, on the twenty-second day of January, A. D. 1863, before R. Rae, commissioner on behalf of libellants. Said deposition, together with the stipulation thereto attached, is in words and figures following, to wit:

CHICAGO MARINE AND FIRE INSURANCE COMPANY
vs.
THE PROPELLER MOHAWK.

DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, *ss*:

Deposition of John W. Strong, of Detroit, a witness produced and sworn at Detroit on Thursday, the 22d of January, 1863, on behalf of the libellants.

And the said John W. Strong saith that he is an insurance agent at Detroit, and has been for the last ten years; knows the propeller Mohawk, and knew her in the year 1860; knew that a disaster occurred to her in the fore part of November, 1860, whereby she was sunk on the St. Clair flats. On or about the 11th of Novem-
16 ber, 1860, I received instructions from the Mutual Insurance Co. of Buffalo, of which I am agent, to sell the cargo of the propeller Mohawk as she lay sunk on the flats. About that time I made sale of it to F. E. Phelps, for the sum of twelve hundred dollars. After the sale I received advices from the Mutual Insurance Company of Buffalo not to sell, as there was a difficulty or some question as to the freight. I was about to cancel the sale when the captain and Mr. Bryant, managing agent of the line of propellers, came into my office, and the question of the freight was discussed between us. I told them I should cancel the sale of the cargo if they insisted upon freight. They made inquiry what it was sold for, and replied "it was too good a sale to be lost," and "we will recognize it as a sale for the benefit of all concerned, as acting for us." The consummation of the sale was made after this conversation. The cargo on board was not delivered until long after this, for the reason that the lighter had started only about an hour or two at most before this conversation took place. The final sale was made by me, acting by advice and instruction of Mr. Bryant and captain of the propeller. After I had determined to revoke the sale originally made by me, under instructions from Mr. Eustaphieve, sec'y of the Mutual Insurance Company of Buffalo, and the sale finally stood, as by agreement, for the benefit of all concerned, to F. E. Phelps, and not for the benefit of the Buffalo Mutual. This final consummation of the sale was made under the orders of the captain and Mr. Bryant, the agent of the Western Transportation Company, and not under orders from any one else. The telegraph hereto appended contained the order given to me, and which I followed as I was directed.

[No. 1.] WESTERN UNION TELEGRAPH COMPANY,
Det., Nov. 13th, 1860.

To J. W. STRONG, [by telegraph from Buffalo, 13, 1860:]

Have nothing to do with grain on Mohawk unless owners of vessel relinquish all claims for freight. Write to-day. Tell them to take it to Buffalo if they want freight. 30 w., 1 45, p'd.

A. A. EUSTAPHIEVE.

I was instructed by Mr. Bryant to hold the money arising from the avails of sales, but no collection of it was ever made by me. I took the note from F. E. Phelps, and sent it to Buffalo to Mr. Eustaphieve, I think, but cannot swear positively.

Cross-examined.

By G. C. Bates, esq., for respondent:

The note for the sale I do not think was given until some days after the sale. I think I saw the captain of the Mohawk and Mr. Bryant the next day after I had agreed with Mr. Phelps to sell him the grain. I remember now that on the 12th of November I enclosed the note of Phelps to Mr. Eustaphieve, sec'y of the Mutual Insurance of Buffalo, informing him "that I had sold the balance in the Mohawk as she now lay sunk on the flats."

J. W. STRONG.

17 Sworn and subscribed before me, by consent, this 22d day of Jan., A. D. 1863, at Detroit.

R. RAE, *U. S. Com'r.*

United States District Court, northern district of Illinois, in admiralty.

Stipulation as to tender.

THE CHICAGO FIRE AND MARINE INSURANCE Company
ag'st
THE PROPELLER MOHAWK.

It is stipulated that the Mutual Insurance Company of Buffalo, on or about the 25th day of December, 1851, tendered to the respondent, at the city of Buffalo, an amount equal to fifteen cents a bushel on the wheat brought to Buffalo, which amounted to 1,000 bushels, and a sum in addition, to cover the general average charges, amounting to $160, and demanded the delivery of the said wheat to it, the said Insurance Company of Buffalo; the defendant refused the tender and to deliver the wheat, on the ground that it was entitled to freight on the entire shipment, in full or pro rata.

R. RAE, *Proctor for Libellant.*
JOHN HUBBELL, *Advocate.*

Indorsed: Filed July 16th, 1863. Wm. H. Bradley, cl'k.

Respondents testimony.

The deposition of John W. Strong and Francis E. Phelps, taken at Detroit, in the State of Michigan, on the sixth day of July, A. D. 1863. before Thomas S. Blackmar, commissioner on behalf of respondent. Said depositions, together with exhibits thereto attached, are as follows, to wit:

And the said John W. Strong, being about the age of forty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter in controversy aforesaid, I did carefully examine the said John W. Strong, and he did thereupon depose, testify, and say as follows, viz:

I reside in Detroit, Michigan. I have been examined in this cause before. I am the person who is the agent in Detroit of the Mutual Insurance Company of Buffalo. It appears from my letter-book that the sale of the wheat on the Mohawk mentioned in my former deposition was made to F. E. Phelps, on November twelfth, 1860, and I suppose that I received his note for the wheat on that day. The letter so states. On that day I advised the Mutual Insurance Company of the sale and of the enclosure of the note of the company. On the same day I wrote an order for the grain, which was signed by the captain of the Mohawk, but not by me. The counsel for the respondent here produces the paper, which is hereto
18 annexed, marked Exhibit A, about which the witness says: This paper is a true and coreect copy of that order. The original is annexed to my deposition this day made, in a cause pending in this court wherein David Dows and Ammi Dows are libellants, and the propeller Mohawk, her boats, tackle, apparel, and furniture are respondents, and the Western Transportation Company is claimant.

The paper hereto annexed, marked Exhibit B, is here produced by the respondent's counsel, and shown to the witness, about which he says:

This paper is a true and correct copy of a telegraphic despatch received by me on November thirteenth. 1860, from A. A. Eustaphieve, who was the secretary of the Mutual Insurance Company of Buffalo. The original message is annexed to a deposition this day made by me in a cause pending in this court, and above referred to by me, wherein David Dows and Ammi Dows are libellants, and the propeller Mohawk, her boats, tackle, apparel, and furniture are respondents, and the Western Transportation Company is claimant. On the day of the date of the telegraph annexed to my former deposition in the cause just mentioned by me, I received said telegraph so annexed to said former deposition, and which message requested me to have nothing to do with the grain on the Mohawk. On receipt of the other message by telegraph, the copy of which is hereto annexed, marked Exhibit B, the grain had not been delivered to Phelps on captain Pheatt's order, and I saw the captain, and Mr. Bryant acting with him, but I do not know for whom, and asked them the question about the freight. They said they should insist on all the freight

they were entitled to. I then told them that if they did not abandon the freight I should cancel the sale. They said it wes too good a sale to be lost, and that they would recognize it as a sale for the benefit of all concerned. I cannot state which of them made that remark. They were together and acted in concert. I cannot particularize what was said by the captain of the Mohawk, or Mr. Bryant. I did not know, of my own knowledge, of Mr. Bryant's connection with the Western Transportation Company. I was informed that some one was coming to act for the company, and when Mr. Bryant came he acted in that capacity. I am not certain whether I received any instructions from Mr. Eustaphieve, in reference to cancelling the sale except what is contained in the telegraph annexed to a former deposition made by me, and hereinbefore mentioned. After receiving that telegraph I saw Mr. Phelps, and found that the lighter had just left the dock with men to go to the Mohawk to take off the grain. I informed him that I might want to send for the lighter back again, or cancel the sale, I do not recollect which. My recollection of that conversation is very vague and indefinite. I supposed the whole matter was ended long ago, and therefore did not charge my memory with it. I do not recollect that anything else was said between Phelps and myself at that time about cancelling the sale. I do not recollect that anything was said between Bryant, the captain of the Mohawk, and myself in reference to this business, ex-
19 cept what I have already stated. In my former deposition where I speak of the consummation of the sale, and of the final sale having been made by me acting upon the advice of Mr. Bryant and the captain of the propeller, and in stating that the sale finally stood as by agreement, for the benefit of all concerned, and not to the benefit of the Buffalo Mutual, I mean to be understood as giving my opinion, based upon the facts already stated by me. As far as I can recollect I have given all the facts relating to this transaction. I had known Harvey D. Pheatt, as master of the propeller Mohawk. I had no personal acquaintance with Mr. Bryant up to that time, but knew him by reputation. He appeared to act with authority in this business. I knew nothing of his connexion with the Western Transportation Company until I met him on this occasion.

J. W. STRONG.

And also the said Francis E. Phelps, being about the age of sixty-four years, and having been by me first cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the matter in controversy aforesaid, I did carefully examine the said Francis E. Phelps, and he did thereupon depose, testify, and say as follows, viz:

I reside in Detroit, Michigan, and resided there in November 1860. I know John W. Strong, agent in Detroit of the Mutual Insurance Company of Buffalo. On, or a day or two before November 12th, 1860, I purchased of him the balance of the cargo of wheat then on the propeller Mohawk. The propeller had met with an accident, having exploaded her boiler or something of that sort, and she was then on the St. Clair flats.

The consideration of that purchase was twelve hundred dollars, I think, I speak from memory, but that was the price, I am quite sure. I gave a note at thirty or sixty days for the purchase money. I delivered the note to Mr. Strong, but do not recollect certainly for what company it was delivered. I received evidence in writing from him of the sale. The paper hereto annexed, marked Exhibit C, is here produced by the witness, about which he says :

This is a true and correct copy of the paper delivered to me by Mr. Strong, on that sale. I have the original in my possession, but am unwilling to part with it, for the reason that I may wish to use it in subsequent business transactions.

After receiving the certificate of purchase, of which this paper Exhibit C, is a copy, I sent a steamer up after the wheat. It was necessary for the captain of the steamer or lighter which I sent to have an order for the wheat. I sent him to Mr. Strong for the order, or, at any rate, I took such steps that the order was procured from the captain of the Mohawk, and I afterwards learned that the order was all right.

The steamer or lighter which went up for me to the Mohawk, took off one or two loads, and then towed the Mohawk down to Detroit with the balance of her cargo on board. She was engaged in that business either five or six days, I am not certain which.

After the Mohawk was towed down to Detroit, I sent a portion of her cargo down to Buffalo on board her.

I do not recollect that anything was said to me by Mr. Strong or any one else about cancelling the sale after I had made the purchase. There was no conversation on that subject to my recollection, and I am very sure I should have remembered it had there been any. There was nothing said to me, to my recollection, about sending for the steamer or ligher and bringing her back. I do not think any such thing occurred, for to my recollection there was never anything said or done about cancelling or breaking off the sale. The Mutual Insurance Company of Buffalo, after the sale to me, sued me on the note which I gave in payment for the wheat. The company afterwards demanded and collected of me one hundred dollars and upward, in addition to the purchase money to be paid by me for the wheat. I do not recollect the precise nature of the charge, but they claimed it as a general average or something of that kind, and finally I paid it.

F. E. PHELPS.

Exhibit A, Thomas S. Blackmar, Commissioner.

DETROIT, *Nov. 12th*, 1860.

The Mutual Ins. Co., of Buffalo, have sold Mr. F. E. Phelps the remaining grain in the Mohawk. You will therefore let him or his agents go on and take it.

(Signed) H. D. PHEATT.

Exhibit B, Thomas S. Blackmar, Commissioner.

DET. *Nov.* 13*th*, 1860.

To Jno. W. Strong, [by telegraph from Buffalo, 13, 1860:]
Your of twelfth (12) rec'd. Sale of grain all right.
(Signed) A. A. EUSTAPHIEVE.

Exhibit C. Thomas S. Blackmar, Commissionee.

DETROIT, *Nov.* 12*th*, 1860.

This to certify that the Mutual Insurance Company of Buffalo has this day sold to F. E. Phelps the balance of grain on the propeller Mohawk, as she now lies sunk on the flats of Lake St. Clair.
(Signed) J. W. STRONG, *Agent.*

Indorsed: Filed July 8th, 1863. Wm. H. Bradley, clerk. Opened for Mr. Rae, proctor, July 8th, 1863. Wm. H. Bradley, clerk.

On this day, to wit, the tenth day of July, A. D. 1863, said parties by their proctors, filed in said clerk's office their stipulatinon in said cause, which said stipulation is in the words and figures following, to wit:

United States District Court, northern district of Illinois in admiralty.

21 *Stipulations as to admitted points.*

DAVID DAWS AND AMMI DOWS,
vs.
THE PROPELLER MOHAWK, HER BOATS, ETC.,

THE CHICAGO FIRE AND MARINE INS. CO.
vs.
THE SAME.

The following points are to be admitted on the trial of this action, for the purposes of such trial:

First. That the Chicago Fire and Marine Insurance Company, one of said libellants, and this respondent, are corporations as stated in the libel and answers. That said propeller, being in good and seaworthy condition, left the port of Chicago upon the alleged voyage, and after the same had been more than half completed and performed in safety, and while so engaged in the prosecution of said voyage grounded upon St. Clair flats; and in the efforts to get off, the said propeller became disabled by the bursting of her boiler, and was thereby compelled to suspend the further prosecution of the said voyage until said propeller could be gotten off and the necessary repairs could be made. This disaster occurred thirty miles from Detroit in the State of Michigan, on the 9th day of November, 1860, and all the wheat, except eleven hundred bushels, was damaged by the sinking of the propeller. That upon information of said disaster reaching Buffalo, the agent of the owner of said wheat immediately abandoned the same to the Mutual Ins. Co. of Buffalo, said company having insured the same against loss or damage on said voyage

by reason of the danger or risk of navigation and other dangers mentioned in said policy.

The Mutual Ins. Co. of Buffalo accepted the abandonment so made, and paid the loss to the owner of the wheat. The propeller was got off after some time, but as to what the length of time, either party may offer further proof, and subsequently was towed to Buffalo in a disabled condition, before the close of navigation for that year, which closed about the middle of December.

No part of the freight on the wheat has been paid or tendered by the shippers or owners thereof, or by the Mutual Ins. Co. of Buffalo, or any other person or persons except as hereinafter mentioned. At the time the same was delivered to and taken by Phelps, no offer to pay the freight or any part of it was made by him or any other person or persons, and that, at the time, no freight was demanded of said Phelps.

Nineteen thousand and ninety (19,090) bushels of wheat were delivered on the flats and at Detroit to Phelps, who became the purchaser, and who gave his note the Mutual Ins. Co. for the purchase money.

Eleven hundred (1,100) bushels were transported to Buffalo
22 in good order, and the libellants tendered full freight on the same, and all other lawful charges, which included fifteen cents freight and general average charges, but refused to pay any pro rata or full freight on said wheat delivered on the flats or at Detroit. Respondents refused to deliver said eleven hundred (1,100) bushels, but still retain the same as aforesaid. The note taken for the sale of the damaged wheat at the flats and Detroit was taken by and held in the possession of the Mutual Ins. Co. of Buffalo, and by them put in judgment.

It is stipulated as to the evidence taken in the cause, and the stipulation shall apply to both cases, that either party is at liberty to take further proof as to any of the matters in issue, whether mentioned in this stipulation or otherwise, but no proof contrary to this stipulation.

ROB'T RAE,
Proctor for Libellant.
BATES & TOWSLEE,
Proctors for Respondent.

Indorsed: Filed July 10th, 1863. Wm. H. Bradley, clerk.

On this day, to wit, the sixteenth day of July, in the July term of A. D. 1863 of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Record entry.

CHICAGO FIRE AND MARINE INSURANCE COMPANY
vs.
PROPELLER MOHAWK. } Libel.

Now come the parties, by their proctors, and thereupon comes on to be heard this cause, on the libel, answer, and proofs on file, and

after hearing the evidence and the arguments of advocates, the court takes the same under advisement.

On this day, to wit, the thirtieth day of September, in the July term, A. D. 1863, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Record entry.

THE CHICAGO MARINE AND FIRE INSURANCE Company *vs.* PROPELLER MOHAWK. } Libel

Now come the parties, by their proctors, and the court having considered and being now fully advised upon the matters heretofore submitted, herein pronounces for the respondent.

It is thereupon considered and adjudged by the court that the libel be dismissed without prejuice, at the costs of the libellant, and that the respondent have and recover of the libellant its costs about its defence in this behalf expended to be taxed, and that execution issue therefor against the said libellant and its stipulator, and the libellant prays an appeal to the Circuit Court.

23 On this day, to wit, the third day of October, A. D. 1863, came said libellant, by its proctor, and filed in said clerk's office its appeal and bond in said cause, which said appeal and bond are in the words and figures following, to wit:

Circuit Court of the United States for the northern district of Illinois

Appeal.

THE CHICAGO FIRE and MARINE INSURANCE CO. *vs.* THE PROPELLOR MOHAWK, WESTERN TRANSPORtation Co., claimants.

DAVID AND AMEI DOUSE *et al.* *vs.* THE SAME.

The appeal of the above-named appellants respectfully showeth: That on or about the 20th day of October, 1862, the above-named libellants, The Chicago Fire & Marine Insurance Company and David and Amei Dowse and John D. Muir, trading as D. and A. Dowse & Co., exhibited their libel in the District Court of the United States for the northern district of Illinois against the appellants, each claiming over fifty dollars, praying, among other things, for the reason set forth in the libel, that these appellants might be condemned to pay the demands of said libellants, the libel having been consolidated by order of the honorable District Court, and amended. That process issued out of said court having been served on the respondents; and they having filed their separate answers to said libels in said District Court praying that the said libel be dismissed, with the costs in that

behalf, as by reference to said libel and the said answers may more fully appear; that the said cause came on to be heard before the honorable Thomas Drummond, judge of the said District Court, on or about the 10th day of July, A. D. 1863, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties; and the judge having advised thereon, on the 30th day of September, A. D. 1863, made a decree or sentence in said court, whereby it was, among other things, sentenced and decreed that the libels filed in this cause be dismissed without prejudice.

And these libellants are advised and insist that these decrees are erroneous, inasmuch as the libellants were entitled to a decree in the premises for the damage claimed in said libel. And the appellants, for these and other reasons, appeal from the whole of the said decree in favor of said respondents, to the present Circuit Court, as per stipulation, to be held in the said district, to have the , and on the said appeal they intend to make more allegations, and introduce the same and other proofs to be introduced to the said Circuit Court; and they pray that the said decree and every part thereof may be reversed, with cost, and such other decree therein made as to the said Circuit Court shall seem just, and that the said ap-
24 pellees be condemned to pay to these appellants their costs and damages in the premises.

R. RAE, *Proctor for Libellants.*

Endorsed: Oct. 3, 1863. W. H. Bradley, clerk.

Appeal bond.

Whereas an appeal has been taken to this court from the District Court of the United States in the northern district of Illinois in a certain cause wherein the Chicago Fire and Marine Insurance Company and David and Amei Dowse and are libellants, against the propeller Mohawk, her boats, &c., the Western Transportation Company are claimants, and the said appellants have been ordered to give security in the sum of five hundred dollars for the payment of all damages and costs on the appeal to this court and to the Supreme Court:

Now, therefore, the stipulators undersigned hereby stipulate, in the said sum of five hundred dollars, to pay all damages and costs on the appeal in this court and in the Supreme Court in case such appeal shall intervene.

JOSHUA BARRELL.
SILAS PRATT.

Taken and acknowledged this 2d day of Oct., 1863.

S. RAE, *U. S. Com'r.*

U. S. A., *Northern District of Ill's, ss:*

Silas Pratt, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth $1,000 over all his debts and liabilities.

SILAS PRATT.

Sworn and subscribed before me this 2d day of Oct., A. D. 1863.
R. RAE, *U. S. Com.*

Bail approved.

BATES & TOWSLEE,
Proctors for Def't.

Endorsed: Filed Oct. 3d, 1863. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

I, William H. Bradley, clerk of the District Court of the United States for the northern district of Illinois, hereby certify the foregoing to be a true and correct transcript of the record of the District Court of the United States for said district, in the cause wherein the Chicago Marine and Fire Insurance Company is libellant, and the Propeller Mohawk is respondent, made up pursuant to the fifty-second rule in admiralty of the Supreme Court of the United States, as the same remains in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at my office, in Chicago, in said
25 district, this twelfth day of October, A. D. eighteen hundred and sixty-three, and of our independence the eighty-eighth year.

[SEAL.] WM. H. BRADLEY, *Clerk*.

Indorsed: Filed Oct. 12th, 1863. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on the twelfth day of October, in the year of our Lord one thousand eight hundred and sixty-three, came David Douse, Ammi Douse, and John D. Muir, libellants, by Robert Rae, esq., their proctor, and filed in the office of the clerk of the Circuit Court of the United States for the northern district of Illinois, at Chicago, in the said district, their transcript of a record from the District Court of the United States for the northern district of Illinois, in admiralty, which said transcript is in the words and figures following, to wit:

Pleas in the District Court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of the District Court aforesaid, and on Wednesday, the thirtieth day of September, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth year.

WM. H. BRADLEY, *Clerk.*

DAVID DOUSE AND AMMI DOUSE AND JOHN D. MUIR
vs.
PROPELLER MOHAWK. } Libel.

Be it remembered, that on the first day of August, in the year of

our Lord one thousand eight hundred and sixty-two, said libellants, by R. Rae, esqr., their proctor, came to the clerk's office of the District Court for the northern district of Illinois, and filed their stipulation for costs, together with their libel, which read in the words and figures following, to wit:

District Court, Sept. term, A. D. 1862.

Libellant's stipulation.

UNITED STATES OF AMERICA, *Northern district of Illinois:*

Whereas a libel was filed in this court on the 1st day of Aug., A. D. 1862, by David Douse *et al.* against the propeller Mohawk, her machinery, &c., boats, tackle, apparel, and furniture, for the reasons and causes in said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the libellant; and the said libellants, and Jonathan Benells and Robert Rae, surety, the parties hitherto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or their surety, execution may issue against their goods, chattels, and lands, for the sum of two hundred and fifty-dollars:

26 Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the Appellate Court.

JOSHUA BARREL.
R. RAE.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

R. Rae, party to the above stipulation, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

R. RAE.

Sworn this 1st day of August, A. D. 1862, before me.
P. A. HOYNE, *U. S. Comm'r.*

Endorsed: Filed Aug. 1, 1862. Wm. H. Bradley, cl'k.

Libel as subsequently amended.

To the honorable Thomas Drummond, judge of the United States District Court for the northern district of Illinois, in admiralty:

The libel of David and Ammi Douse and John D. Muir, of the city of New York, and doing business under the firm name and style of D. & A. Douse & Co., against the propeller Mohawk, her boilers, machinery, boats, tackle, apparel, and furniture, in a cause of contract and affreightment, civil and maritime, alleges as follows:

First. That the said propeller Mohawk, now lying at Chicago, in the district aforesaid, is a vessel of more than twenty tons burthen,

and at the time when the cause of action hereafter stated and set forth arose was, and is now, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters connecting the same.

Second. That on or about the 31st day of October, A. D. 1860, D. & A. Douse & Co., libellants aforesaid, shipped on board the propeller Mohawk, then lying at the port of Chicago, in the State of Illinois, the said propeller then being a common carrier, ten thousand two hundred seventeen and 45-60 bushels of number one spring wheat, to be transported and conveyed on board of said propeller from the port of Chicago, in the State of Illinois, to the port of Buffalo, in the State of New York, and to be delivered by the said propeller Mohawk safely at said port of Buffalo, to the consignees of said libellant, upon paying the freight of fifteen cents per bushel for each and every bushel so delivered as aforesaid, according to the tenor and effect of the bill of lading made, signed, and delivered by the agent of said propeller Mohawk to said libellants in the premises, a copy of which is hereunto annexed, and which libellants pray may be taken as part of this libel.

27 Third. That said ten thousand two hundred seventeen and $\frac{45}{60}$ bushels of wheat was, at the time it was delivered by the libellants on board said propeller Mohawk as aforesaid, in good condition, and of the value of about ten thousand two hundred seventeen dollars and seventy-five cents; that said wheat was, at the time of its delivery to said propeller for transportation as aforesaid, the property of libellants, and of the value above stated.

Fourth. That said wheat was not carried and transported by said propeller Mohawk from said port of Chicago to the said port of Buffalo, nor was the same or any part thereof delivered at Buffalo to the consignee of libellants, or to any person or persons for libellants; but, on the contrary, the said wheat, whilst on board of said propeller and in the possession, custody, and care of the officers of said propeller, became and was wholly lost to libellants.

Fifth. That by reason of the said failure of the said propeller Mohawk to deliver said wheat as aforesaid at Buffalo, according to the obligation of said bill of lading, and of her loss aforesaid, libellants have suffered damage to the full amount of the value of said wheat, to wit, the sum of ten thousand two hundred seventeen and $\frac{75}{100}$ dollars, for which the said libellants claim compensation of and from the owner of said propeller Mohawk, but that said owner of said propeller denies any and all liability for and on account of said loss, and refuses to make any satisfaction for said loss, although by libellants often requested so to do.

Sixth. That there is now due and unpaid libellants from said owner the sum of ten thousand two hundred seventeen and $\frac{75}{100}$ dollars for and on account of said contract of affreightment.

Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellants pray that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said propeller Mohawk, her boilers, engines, machinery, boats, tackle, apparel, and furniture; and that the said owner, and all persons claiming any right, title, and interest in the said propeller Mohawk, may be cited to appear and answer upon oath all and singular the matters aforesaid; and that the said vessel may be condemed and sold to pay the amount due the libellants, with interest and costs; and that the libellants may have such other and further relief as in law or justice they may be entitled to receive.

DAVID DOUSE & Co.,
By R. RAE, *Proctor.*
JOSHUA BARREL.

Sworn and subscribed before me this 1st day of Aug., A. D. 1862.
P. A. HOYNE, *U. S. Com'r.*

CHICAGO, *Oct.* 31*st*, 1860.

Shipped in good order and condition by N. K. Fairbank, as agent and forwarder, for account and at the rish of whom it may conern, on board the prop. Mohawk, whereof Pheatt is master, the
28 following articles, as here marked and described, to be delivered in like good order and condition as addressed in the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, the dangers of navigation, fire, and collision excepted.

In witness whereof, the said master of said vessel hath affirmed to bills of lading of this tenor and date, one of which being accomplished, the other to stand void.

Ac. D. & A. D. & Co., New York; care J. D. Sawyer, Buffalo.
10,217 45 bushels No. 1 spring wheat. Freight to Buffalo, 15 cts.
(Signed) JON. W. TUTTLE, *Ag't.*
T. J. BRONSON.

Indorsed: Filed Aug. 1, 1862. Wm. H. Bradley, cl'k.

And thereupon a monition was issued out of said court, in the words and figures following, to wit:

Monition.

THE UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas a libel hath been filed in the District Court of the United States in and for the northern district of Illinois, on the first day of August, in the year of our Lord one thousand eight hundred and sixty-two, by David and Ammi Douse, against the propeller Mohawk, her boilers, machinery, boats, tackle, apparel, and

furniture, for reasons and causes in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons having or pretending to have any right, title, or interest therein may be cited to appear and answer all and singular the matters in said libel articulately propounded, and that this court would be pleased to pronounce for the sum of ten thousand two hundred and seventeen dollars and seventy-five cents, the damages alleged in said libel, besides costs of suit: You are, therefore commanded to attach the said propeller Mohawk, her boilers, machinery, boats, tackle, apparel, and furniture, and to detain the same in your custody until the further order of this court respecting the same, and to give due notice by publication in some daily paper printed in the city of Chicago, for fourteen days previous to the day of trial, and by notice posted up in the most public manner for the space of fourteen days, at or near the place of trial and seizure and libel, to all persons claiming the said propeller Mohawk, her boilers, machinery, boats, tackle, apparel, and furniture, or knowing or having anything to say why this court should not pronounce against the same according to the prayer of the said libel, and that they be and appear before the said court to be held in and for the northern district of Illinois, at the United States court-room, in the city of Chicago, in said district, on the first 29 Monday in September next, if that day be a day of jurisdiction, if not, then on the first day of jurisdiction thereafter, at 10 o'clock in the forenoon of that day, then and there to interpose a claim for the same, and to make their allegations in that behalf; and what you shall have done in the premises, do you then and there make return, together with this writ.

Witness the honorable Thomas Drummond, judge of the said court, this first day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the 87th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Marshal's return.

By virtue of the within writ I have, on this 1st day of August, A. D. 1862, attached the within-named propeller Mohawk, and have, on the same day, released said propeller from custody by order of R. Rae, libellant's proctor.

Bond for release herewith returned.

J. R. JONES, *U. S. Marshal.*
By GEO. L. WEBB, *Deputy.*

Indorsed: Filed Oct. 8, 1862. W. H. Bradley, cl'k.

Bond taken by marshal..

Know all men by these presents, that we, The Western Transportation Company, as principal, Dean Richmond, of Batavia, in the State of New York, and Nathan W. Tuttle, as sureties, are held and firmly bound unto David Dous and Ammi Dous, in the sum of twenty-one

thousand dollars lawful money of the United States of America to be paid to the said David Dous and Ammi Dous, their executors, administators, or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals; dated the fifteenth day of August, one thousand eight and sixty-two.

Whereas, in a certain cause of civil and maritime, moved and prosecuted in the district court of the United States of America for the northern district of Illinois, on behalf of the above-named obligees, against the ship or vessel called the propeller Mohawk, her boats, tackle, apparel, and furniture, a warrant of arrest has been issued out of the said court against the said ship or vessel, her tackle, apparel, and furniture, in virtue of which said warrant the said ship or vessel, her tackle, apparel, and furniture have been arrested by J. R. Jones, one of the deputies of the marshal of the said district, and are now in custody:

Now, therefore, the condition of the above obligation is such, that if the Western Transportation Company, the claimant of the said ship or vessel, her boats, tackle, apparel, and furniture shall well
30 and truly abide and answer the decree of the said court in the aforesaid cause, without fraud or other delay, then the above obligation to be void, otherwise it shall remain in full force and virtue.

THE WESTERN TRANSPORTATION CO.,
[SEAL.] By JNO. ALLEN, JR., *P't.*
[SEAL.] DEAN RICHMOND.
[SEAL.] JONATHAN W. TUTTLE.

STATE OF NEW YORK, *Northern district of New York, Erie County*:

I hereby certify that on the fifteenth day of August, 1862, before me came the above-named Dean Richmond, to me known to be the same person described in and who executed the above bond, and acknowledged that he had executed the same for the purposes therein mentioned; and being by me duly sworn, the said Dean Richmond made oath that he has property in the State of Illinois, and within the northern district thereof, worth forty thousand dollars over and above all incumbrances thereon. And on the same day came before me John Allen, junior, to me known, and made oath that he is the president of The Western Transportation Company, the principal in the foregoing bond, and that the seal affixed thereto is the corporate seal of the said The Western Transportation Company, and was affixed thereto by the authority of the board of directors of said company, and by the like authority he did subscribe the name of the said company thereto, and his own name as president thereof, for the purposes therein expressed.

P. G. PARKER, *U. S. Commissioner.*

Indorsed: Approved. R. Rae, proctor. Approved. Thomas Drummond. Filed Oct. 8 1862. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 20th day of October, A. D. 1862, came the Western Transportation Company, the respondent herein, and filed its answer to the libel herein, in the words and figures following, to wit:

United States District Court, northern district of Illinois, in admiralty.

Respondent's answer.

To the honorable Thomas Drummond, judge of the District Court of the United States in and for the northern district of Illinois.

The answer of the Western Transportation Company, claimant and respondent, to the libel and complaint of Davis Dows and Ammi Dows, against the propeller Mohawk, her boilers, boats, tackle, apparel, and furniture, exhibited and filed in this court, in a cause of contract, civil and maritime, alleges and propounds as follows:

31 First. That it, the said respondent, is a corporation created organized, and existing under the laws of the State of New York, and now is, and was at the several times in the said complaint mentioned, the owner of the said propeller Mohawk, her engine, boats, tackle, apparel, and furniture.

Second. And as to the several matters and things stated and charged in the first article of said libel, the respondent admits that the said propeller was, at the several times in the said libel mentioned, enrolled and licensed for the coasting trade on the lakes, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, and the navigable waters connecting the same.

Third. And as to the several matters and things stated and charged in the second article of the said libel, the respondent denies the same, and each and every part thereof, in manner and form as the same are therein stated and charged, except in so far as the same are hereinafter admitted to be true, or are consistent with the facts hereinafter stated.

Fourth. And as to the several matters and things in the third article of the said libel stated and charged, the said respondent admits that on or about the day mentioned in said libel there was delivered on board the said propeller Mohawk, for transportation from Chicago to Buffalo, ten thousand two hundred and seventeen and 45-60 bushels of wheat, at the freight of fifteen cents per bushel; that the same was in good condition and of value of about ten thousand two hundred seventeen and 75-100 dollars; and as to each and every other matter or thing in the said third article stated and charged, the respondent denies the same in manner and form as the same are therein stated and set forth.

Fifth. And as to the several matters and things in the fourth article of the said libel stated and charged, the respondent admits that the wheat was not carried from Chicago to Buffalo, nor was the same delivered at Buffalo to the consignee of the libellants, or to any person or persons at Buffalo for the libellants; but the respondent denies

that the said wheat, or any portion thereof, became lost to the libellants while on board the propeller and in the possession, custody, and care of the officers of the said propeller. On the contrary thereof, the respondents say that the said propeller and the officers thereof were prevented from carrying the said wheat to the place of destination, and there delivering the same, by the act of the said libellants, as is hereinafter particularly stated and set forth. And that the officers of the said propeller delivered all of said wheat at a place short of destination, to a person claiming and having title thereto from and through the libellants, and that such delivery was so made with the knowledge, consent, direction, and concurrence of the said libellant.

Sixth. And as to the several matters and things in the fifth article of said libel contained, the respondent denies the same, and each and every part thereof, in manner and form as the same are therein stated and set forth, except that it denies any and all liability
32 for said pretended loss, and refuses to make any satisfaction therefor to the libellants.

Seventh. And as to the several matters and things in the sixth article of said libel stated and charged, the respondents deny the same, and each and every part thereof, in manner and form as the same are therein stated and charged.

Eighth. And as to the several matters and things in the seventh article of said libel contained, the respondents deny the same, and each and every part thereof, in manner and form as the same are therein stated and set forth.

Ninth. And further answering the said libel and complaint, the respondent says that the wheat mentioned in the said libel, and in the bill of lading therein set forth and referred to, was, on or about the day mentioned in the said libel, shipped on board the said propeller Mohawk, which was then lying at Chicago aforesaid and destined on a trip or voyage from Chicago to Buffalo, by one Frederick N. Bronson, who was then the owner thereof, under a certain contract of affreightment then and there made between the said Bronson and the said respondent, its officers and agents, at Chicago, in and by which said contract the said respondents undertook and agreed to carry and transport the said wheat on board the said propeller from Chicago to Buffalo at the rate of freight specified in the bill of lading set forth in the said libel, and there deliver the same to the said Bronson, or to his order or assigns, upon payment of the freight and charges agreed to be paid therefor, dangers of navigation, fire, and collision excepted. That one N. K. Fairbanks, of the city of Chicago, having made certain advances of money to the said Bronson, either upon his own account as principal or on account of said libellants, and which the said respondents are unable to state, it was then and there agreed by and between the said Bronson and the said Fairbanks that he, the said Fairbanks, or the person or persons on whose account such advances were made, should have a lien upon and control of the said wheat for the purpose of securing the repayment of such advances; and thereupon the bill of lading in this libel

set forth was, by the direction of the said Bronson, made out and delivered to the said Fairbanks as security for such advances, and not otherwise, in order that he, the said Fairbanks, or the parties on whose account such advances had been made, might control the property or the avails thereof for the purpose of such security. And the said respondents, further answering, say that the advances so made by the said Fairbanks and the said libellants have been and were fully paid to the said libellants before the commencement of this said suit, and that the interest of the said libellants in and to the said wheat was terminated before the commencement of this suit.

Tenth. And further answering the said libel and complaint, the respondent says that upon the said shipment having been so made as stated and set forth in the ninth article of the answer, the said Bronson caused and procured the wheat to be insured against the perils and dangers of navigation upon the said trip or voyage from Chicago to Buffalo aforesaid, by and in the Mutual Insurance
33 Company of Buffalo, a corporation created under the laws of the State of New York and duly authorized to make insurance of this and like character, and directed the loss, if any there should be, to be paid to the said D. & A. Dows & Co., all of which was done as further security for the advances in the ninth article of this answer mentioned and referred to.

Eleventh. And further answering, the respondent says that the said propeller Mohawk, on or about the thirty-first day of October, one thousand eight hundred and sixty, left the said port of Chicago for Buffalo aforesaid, on her said trip or voyage, being then in all respects tight, staunch, strong, and in all respects seaworthy, and while in the successful prosecution of her said voyage, on the evening of the sixth of November, one thousand eight hundred and sixty, was, by the perils and dangers of navigation and not otherwise, and without fault on the part of the said propeller, her officers or crew, or any or either of them, stranded or grounded upon St. Clair flats, and [and] then and there became temporarily disabled by reason of and consequence of such stranding, and was compelled to suspend the further prosecution of the said voyage for the time being, and until the necessary repairs to enable the said propeller to proceed upon and to complete her said voyage could be made. And further answering, the said respondents say that the person named in the said bill of lading, to whose care the said wheat was consigned at Buffalo, that is to say, the said James D. Sawyer, acting as the agent of the said libellants and of the said Bronson, immediately upon being informed of the accident and detention of the said propeller, as hereinbefore mentioned, did, for and on account of said libellants, and for and on account of the owners of the said wheat, whose interest was covered by the insurance hereinbefore mentioned, abandon the same to the insurers thereof, that is to say, to the said The Mutual Insurance Company of Buffalo, and claimed as for a total loss under the said insurance so made as aforesaid; and thereupon the said insurers; that is to say, the said The Mutual Insurance Company of Buffalo, did then and there accept the said abandonment so made

as aforesaid, and did then and there pay to the said libellants, and to the said Bronson, the amount for which the said wheat was so insured as aforesaid, and the said The Mutual Insurance Company of Buffalo, became and was the owner of the said wheat mentioned in the said libel and on the bill of lading therein set forth. And thereupon the said The Mutual Insurance Company of Buffalo, did, with the assent of the said libellants, and of the said Bronson, assume to be the owners of the said wheat, and each and every part thereof. And the said respondents further say, that from and after the said abandonment and the acceptance thereof, the said propeller and the officers thereof, and the said respondents, held the said wheat as the bailees of the said The Mutual Insurance Company of Buffalo, and did thereafter deliver to it, the said The Mutual Insurance Company of Buffalo, the wheat mentioned in the said bill of lading, and each and every part thereof, excepting as hereinafter stated, all of which was well known to the said libellants, and all of which was done with the knowledge, consent, concurrence, and approbation of the said libellants, and of the said Bronson.

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Twelfth. And further answering, the said respondents say that the detention of the said propeller, in consequence of the said accident and misfortune, was of a temporary character, and that within a few days after the said occurrence the said propeller was got off and taken to Detroit, a distance of about thirty miles from the place of the accident, and was subsequently taken from Detroit to Buffalo, where she arrived before the close of navigation for the then present season, and within two weeks from the time of the accident.

And the respondent further says, that the place of the accident and detention was directly in the track of all vessels engaged in navigating the lakes between the port of Detroit and the upper lakes, and that the said wheat, all of which remained on board the said propeller, could have been readily transhipped and sent forward to Buffalo by other vessels in case it should have been found impracticable to have sent the same forward on the said propeller, and the said respondents would have so done but for the actings and doings of the said libellants and the said The Mutual Insurance Company of Buffalo, as herein set forth.

Thirteenth. And further answering, the respondents say that the wheat mentioned in the said libel and complaint was shipped on board the said propeller at the same time and in connexion with a certain other quantity of wheat, consisting of ten thousand two hundred and seventeen and $\frac{4\,5}{6\,7}$ bushels of the same character and value with that mentioned in the libel, and that the two parcels were not separated; that the two quantities or parcels were each of them insured by and in the said The Mutual Insurance Company of Buffalo, and were both consigned to the care of the same person at Buffalo, as the agent of the respective libellants and of the owners and consignees of the said two parcels of wheat.

That, upon the occurrence of the before-mentioned accident, the person to whom the same were consigned being the said James D. Sawyer, named in the said bill of lading, acting as the agent of the

said libellants, and as the agent of the owner of the other parcel, abandoned each separate parcel of wheat to the said insurance company, and the said insurance company did then and there accept the said abandonment of each of the said parcels and quantities of wheat; and thereupon the said insurance company, having accepted the said abandonment, did sell the said wheat which had been so abandoned to it as aforesaid to a certain person in the city of Detroit, that is to say, to one F. W. Phelps, and did then and there require the master of the said propeller to deliver the said wheat from the said propeller to the purchaser thereof, and thereupon the master of the said propeller did deliver to the said purchaser, at the place of such detention, eight thousand bushels of the said wheat, and upon the arrival of the said propeller at Detroit, within a few days thereafter, the master thereof delivered to the said
35 purchaser the further quantity of eleven thousand and ninety bushels of the said wheat so abandoned, making all of the wheat included in the two shipments in this article mentioned, (of which the wheat in the libel mentioned is part and parcel,) except that eleven hundred bushels of wheat, taken from the said two parcels before the said sale by the insurance company had been communicated to the respondents, had been sent forward to the place of destination by the respondents by another vessel. And further answering, the respondents say that the wheat mentioned in the libel was part and parcel of the wheat so delivered to the purchasers from the said insurance company, and that the same was so delivered under and by virtue of the said abandonment, and with the knowledge, concurrence, and consent of the libellants; and that by reason of the actings and doings aforesaid on the part of the said libellants, and of the said insurance company, it was prevented from carrying the said wheat to the place of destination, as it otherwise might, and could, and would have done; and that all of the said wheat mentioned in the said libel was so delivered to the said purchasers from the said insurance company except the proportion of the eleven hundred bushels so forwarded as aforesaid, which was and is about five hundred and fifty bushels, and that the said wheat, so forwarded, has not been delivered to the said libellants, for the reason that neither the said libellants, nor any other person or persons, has paid, or offered to pay, the freight due to the said respondents under and by virtue of the said contract and bill of lading, nor any part thereof, and that the said respondents have and do detain the same as security for the payment of such freight.

Fourteenth. And the respondents further say, that at the time of the accident to the said propeller hereinbefore mentioned, the said trip or voyage had been more than half completed and performed, and that the said wheat had been carried more than half the distance embraced in the said voyage, and that neither at the time of the said abandonment and the acceptance thereof by the said insurance company nor at any other time has the libellant, nor any other person or persons, paid to the said respondent, or to its officers or agents, the freight agreed to be paid for the transportation thereof, and in the

said bill of lading stipulated and provided for. Nor has any part thereof been paid or offered to be paid. And the respondent in fact further say, that the said abandonment was so made without its request or knowledge, and solely at the instance of said libellants, and the same was so accepted by the said insurance company without the consent or knowledge of the respondents. And the respondent in fact further says, that in making the delivery of the said wheat to the said insurance company, it did not waive or release its right to the payment of the freight stipulated for in the bill of lading, nor to any part thereof; that the delivery of the said wheat to the said insurance company, and to the purchasers from and under it, was at the request of the said company, and the same was voluntarily accepted by the said insurance company, and the said purchaser, and not otherwise.

36 Fifteenth. And the said respondents in fact further say, that of the said two parcels of wheat hereinbefore mentioned, there remains in the hands of the said respondents eleven hundred and fifty bushels thereof, and that the same is detained by respondents as security for the payment of the freight upon the said two parcels, so far as the same will go; that the value thereof is about eleven hundred dollars, and that the respondents have no other security for the payment of the said freight.

Wherefore, the respondents pray that this honorable court will be pleased to pronounce against the claim of the libellants, and that the said libel may be dismissed, with costs; and the respondents further pray that this honorable court will be pleased to decree, decide, and adjudge that the libellants, by reason of the premises and of the various matters hereinbefore stated, is liable to pay to the said respondents the freight stipulated in the bill of lading in the said libel mentioned, and that the said respondents may have judgment therefor, and that the same may be enforced by process issuing out of and under the seal of this honorable court.

THE WESTERN TRANSPORTATION COMPANY.
By JNO. ALLEN, JUNIOR, *President.*

UNITED STATES OF AMERICA, *Northern District of New York:*

On this 10th of October, 1860, personally appeared before me, John Allen, junior, of the city of Buffalo, in the district aforesaid, and made oath that he is the president of the Western Transportation Company, the respondent named in the foregoing answer; that he has read the same and knows the contents thereof; that the case in this action and the facts stated in said answer are better known to the said deponent than any other officer or agent of the respondent, and that the said answer is true in substance and matter of fact.

P. G. PARKER, *U. S. Commissioner.*

Indorsed: Filed Oct. 20, 1862. Wm. H. Bradley, cl'k.

And also on said 20th day of October filed its stipulation as follows, to wit:

District Court, November term, A. D. 1862.

Stipulation.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Whereas a libel was filed in this court on the day of , A. D. 1862, by David Dows and Ami Dows against the propelier Mohawk, her engines, boats, tackle, apparel, and furniture, for the reasons and causes in the said libel mentioned; and whereas a claim has been filed in the said cause by the Western Transportation Company, and the said Western Transportation Company and Bohan S. Shepperd, their surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its surety, execution may issue against their goods,
37 chattels, and lands, for the sum of two hundred and fifty dollars: Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the claimant above named shall pay all such costs as shall be awarded against by this court, or, in case of appeal, by the Appellate Court.

THE WESTERN TRANSP'T. CO.
By JOHN W. TUTTLE, *Ag't.*
BOHAN S. SHEPPERD.

NORTHERN DISTRICT OF ILLINOIS,

State of Illinois, county of Cook, city of Chicago, ss:

Bohan S. Shepperd, party to the above stipulation, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all debts and liabilities.

BOHAN S. SHEPPERD.

Sworn this twentieth day of October, A. D. 1862, before me. Witness my hand and notarial seal.

[SEAL.] CHARLES A. GREGORY,
Notary Public.

Indorsed: Filed Oct. 20th, A. D. 1862. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 15th day of June, A. D. 1863, in the record of the proceedings of said court in said cause, is the following entry, to wit:

DAVID DOUSE and AMMI DOUSE
v.
PROPELLER MOHAWK. } Libel.

Now come the parties, by their proctors, and thereupon comes on to be heard the motion of the respondent, on affidavit filed, to dis-

miss this cause; after argument, the court takes said motion under advisement.

And afterwards, to wit, on the 16th day of June, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

DAVID DOUSE and AMMI DOUSE
v.
PROPELLER MOHAWK. } Libel.

The court having considered and being now fully advised on the motion heretofore submitted to dismiss this cause, overrules the same.

And afterwards, to wit, on the 20th day of June, A. D. 1863, in the record of the proceedings of said court in said cause, is the following entry, to wit:

38 DAVID DOUSE and AMMI DOUSE
v.
PROPELLER MOHAWK. } Libel.

On motion of the libellants, by R. Rae, esq., their proctor, leave is given to amend the libel.

And afterwards, to wit, on the 16th day of July, A. D. 1863, in the record of the proceedings of said court in said cause, is the following entry, to wit:

DAVID DOUSE, AMMI DOUSE, and John D. Muir
v.
PROPELLER MOHAWK. } Libel.

Now come the parties, by their proctors, and this cause being set down for hearing on the libel, answer, and proofs on file, and after hearing the evidence and the arguments of advocates, the court takes the same under advisement.

United States District Court, northern district of Illinois, in admiralty.

THE CHICAGO FIRE AND MARINE Insurance Company
ag'st
THE PROPELLER MOHAWK.

It is stipulated that the Mutual Insurance Company of Buffalo, on or about the 25th day of December, 1861, tendered to the respondent, at the city of Buffalo, an amount equal to fifteen cents a bushel on the wheat brought to Buffalo, which amounted to 1,000 bushels, and a sum in addition, to cover the general average charges, amounting to $160, and demanded the delivery of the said wheat to it, the

said Insurance Company of Buffalo; the defendant refused the tender and to deliver the wheat, on the ground that it was entitled to freight on the entire shipment in full, pro rata.

R. RAE, *Proctor for Libellant.*
JOHN HUBBELL, *Advocate.*

Deposition of John W. Strong, of Detroit, a witness produced and sworn at Detroit, on Thursday, the 22d of January, 1863, on behalf of the libellants.

And the said John W. Strong saith that he is an insurance agent at Detroit, and has been for the last ten years; knows the propeller Mohawk, and knew her in the year 1860; knows that a disaster occurred to her in forepart of November, 1860, whereby she was sunk on the St. Clair flats. On or about the 11th of November, 1860, I received instructions from the Mutual Insurance Co. of Buffalo, of which I am agent, to sell the cargo of the propeller Mohawk as she lay sunk on the flats. About that time I made sale of it to F. E. Phelps for the sum of twelve hundred dollars. After the sale I received advices from the Mutual Insurance Company at Buffalo
39 not to sell, as there was a difficulty on some question as to the freight. I was about to cancel the sale when the captain and Mr. Bryant, managing agent of the line of propellers, came into my office, and the question of freight was discussed between us. I told them I should cancel the sole of the cargo if they insisted upon freight. They made inquiry what it was sold for, and replied "It was too good a sale to be lost," and "we will recognize it as a sale for the benefit of all concerned, as acting for us." The consummation of the sale was made after this conversation. The cargo on board was not delivered until long after this, for the reason that the lighter had started only about an hour or two at most before this conversation took place. The final sale was made by me, acting by advice and instructions of Mr. Bryant and captain of the propeller, after I had determined to revoke the sale originally made by me, under instructions from Mr. Eustaphieve, s'c'y of the Mutual Insurance Company of Buffalo, and the sale finally stood, as by agreement, for the benefit of all concerned, to F. E. Phelps, and not for the benefit of the Buffalo Mutual. This final consumation of the sale was made under the orders of the captain, and Mr. Bryant, the agent of the Western Transportation Company, and not under orders from any one else. The telegraph hereto appended contained the order given to me and which I followed, as I was directed.

DET., *Nov.* 13, 1860.

To J. W. Strong, [by telegraph from Buffalo, 13, 1860:]

Have nothing to do with grain on Mohawk unless owners of vessel relinquish all claim for freight. Write to-day. Tell them to take it to Buffalo if they want freight.

A. A. EUSTAPHIEVE.

I was instructed by Mr. Bryant to hold the money arising from the avails of sale, but no collection of it was ever made by me. I took the note from F. E. Phelps, and sent it to Buffalo to Mr. Eustaphieve, I think, but cannot swear positively.

Cross-examined.

By S. C. Bates, esq., for respondent:

The note for the sale I do not think was given until some days after the sale. I think I saw the captain of the Mohawk and Mr. Bryant the next day after I had closed with Mr. Phelps to sell him the grain. I remember now that on the 12th of November I enclosed the note of Phelps to Mr. Eustaphieve, sec'y of the Mutual Insurance of Buffalo, informing him that I had sold the balance in the Mohawk as she now lies sunk on the flats.

J. W. STRONG.

Sworn and subscribed, by consent, before me this 23d day of Jan., 1863, at Detroit.

R. RAE, *U. S. Com'r.*

Indorsed: Filed July 16, 1863. Wm. H. Bradley, c'lk.

40 And afterwards, on the 10th day of July, A. D. 1863, the following stipulation was filed in said cause, and reads as follows, to wit:

United States District Court, northern district of Illinois, in admiralty.

Stipulation.

DAVID DOWS AND AMMI DOWS
vs.
THE PROPELLER MOHAWK, her boats, &c.

THE CHICAGO FIRE AND MARINE INS. CO.
v.
THE SAME.

The following points are to be admitted on the trial of this action for the purpose of such trial:

First. That the Chicago Fire and Marine Insurance Company, one of said libellants, and this respondent are corporations as stated in the libel and answer; that said propeller, being in good and seaworthy condition, left the port of Chicago upon the alleged voyage, and after the same had been more than half completed and performed in safety, and while so engaged in the prosecution of said voyage, grounded upon St. Clair flats, and in the effort to get off the said propeller became disabled by the bursting of her boiler, and was thereby compelled to suspend the further prosecution of the said voyage

until said propeller could be gotten off and the necessary repairs could be made. This disaster occurred thirty miles from Detroit, in the State of Michigan, on the 7th day of November, 1860, and all the wheat except eleven hundred bushels was damaged by the sinking of the propeller; that upon information of said disaster reaching Buffalo, the agent of the owner of said wheat immediately abandoned the same to the Mutual Ins. Co. of Buffalo, said company having insured the same against loss or damage on said voyage by reason of the danger or risk of navigation and other dangers mentioned in said policy. The Mutual Ins. Co. of Buffalo accepted the abandonment so made, and paid the loss to the owner of the wheat. The propeller was got off after some time, but as to what the length of time, either party may offer further proof, and subsequently was towed to Buffalo in a disabled condition before the close of navigation for that year, which closed about the middle of December. No part of the freight on the wheat has been paid or tendered by the shippers or owners thereof, or by the Mutual Ins. Co. of Buffalo, or any other person or persons, except as hereinafter mentioned. At the time the same was delivered to and taken by Phelps no offer to pay the freight or any part of it was made by him or any other person or persons, and that at the time no freight was demanded of said Phelps. Nineteen thousand and ninety (19,090) bushels of wheat were delivered on the flats and at Detroit to Phelps, who became the purchaser and who gave his note to the Mutual Ins. Co. for the purchase money. Eleven hundred (1,100) bushels were
41 transported to Buffalo in good order, and the libellants tendered full freight on the same and all their lawful charges, which included fifteen cents freight and general average charges, but refused to pay any pro rata or full freight on said wheat delivered on the flats or at Detroit, Respondents refused to deliver said eleven hundred (1,100) bushels, but still retain the same as aforesaid. The note taken for the sale of the damaged wheat at the flats and Detroit was taken by and held in the possession of the Mutual Ins. Co. of Buffalo, and by them put in judgment. It is stipulated as to the evidence taken in the cause, and the stipulation shall apply to both cases, that either party is at liberty to take further proof as to any of the matters in issue, whether mentioned in this stipulation or otherwise, but no proof contradictory to this stipulation.

ROB. RAE,
Proctor for Libellant.
BATES & TOWSLEE,
Proctors for Respondent.

Indorsed: Filed July 10, 1863. Wm. H. Bradley, cl'k.

DAVID DOWS and AMMI DOWS
vs,
THE PROPELLER MOHAWK.

The deposition of Jno. W. Strong and Francis E. Phelps, taken the 6th day of July, 1863, before Thomas S. Blackman, commissioner, at Detroit, on the part of the respondents.

And the said Jno. W. Strong, being about the age of forty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter in controversy aforesaid, I did carefully examine the said Jno. W. Strong, and he did thereupon depose, testify, and say as follows, viz:

I reside in Detroit, Michigan; I have been examined in this cause before; I am the person who is the agent in Detroit, of the Mutual Insurance Company of Buffalo. It appears from my letter-book that the sale of the wheat on the Mohawk, mentioned in my former deposition, was made to Phelps, on November 12th, 1860, and I suppose that I received his note for the wheat on that day—the letter so states. On that day I advised the Mutual Insurance Company of the sale and of the enclosure of the note to the company. On the same day I wrote an order for the grain, which was signed by the captain of the Mohawk, but not by me. The counsel for the respondent here produces the paper which is hereto annexed, marked Exhibit A, about which the witness says: This paper is that order. The witness then produces the telegraphic message hereto annexed, marked Exhibit B, about which he says, I received this message November 13th, 1860, from A. A. Eustaphieve, who was the secretary of the Mutual Insurance Company of Buffalo. On the day of the date of the telegraph annexed to my former deposition, I received that so annexed to said former deposition, which requested me to have
42 nothing to do with the grain on the Mohawk. On receipt of this last telegraph the grain had not been delivered on order to Phelps, and I saw the captain of the Mohawk and Mr. Bryant acting with the captain, but I do not know for whom, and I asked them the question about the freight. They said they should insist on all the freight they were entitled to. I then told them if they did not abandon the freight I should cancel the sale. They said it was too good a sale to be lost, and that they would recognize it as a sale for the benefit of all concerned. I cannot tell which of them made that remark. They acted in concert. I cannot particularize what was said by either the captain of the Mohawk or Mr. Bryant. I did not know of my own knowledge of Mr. Bryant's connection with the Western Transportation Company; I was informed that somebody was coming to act for the company, and when Mr. Bryant came he acted in that capacity. I am not certain whether I received any instructions from Mr. Eustaphieve in reference to cancelling the sale, except what is contained in the telegraph annexed to my former deposition. After receiving that telegraph I saw Mr. Phelps, and found that the lighter had just left the dock with men to go to the Mohawk to take off the grain. I informed him that I might want to

send for the lighter back again or cancel the sale, I am not positive which. My recollection of that conversation is very vague and indefinite. I supposed the whole matter was ended long ago, and thereupon did not charge my memory with it I do not recollect that anything else was said between Phelps and myself at that time about cancelling the sale. I do not recollect that anything was said between Bryant, the captain of the Mohawk, and myself in reference to this business, except what I have already stated. In my former deposition, where I speak of the consummation of the sale and the final sale having been made by me, acting upon the advice of Mr. Bryant and the captain of the propeller, and in stating that the sale finally stood, as by agreement, for the benefit of all concerned to Mr. F. E, Phelps, and not to the benefit of the Buffalo Mutual, I meant to be understood as giving my opinion, based on the facts already stated by me. As far as I can recollect, I have given all the facts relating to this transaction. I had known Harvey D. Pheatt as master of the propeller Mohawk; I had no personal acquaintance with Mr. Bryant up to that time, but knew him by reputation; he appeared to act with authority in this business; I knew nothing of his connexion with the Western Transportation Company until I met him on this occasion.

J. W. STRONG.

And also the said Francis E. Phelps, being about the age of sixty-four years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter in controversy aforesaid, I did carefully examine the said Francis E. Phels, and he did thereupon depose, testify, and say as follows, viz:

I reside in Detroit, Michigan, and resided there in November, 1860; I know John W. Strong, agent in Detroit of the Mutual Insurance Company of Buffalo. On a day or two before November 12th, 1860, I purchased of him the balance of the cargo of wheat then on the propeller Mohawk. The propeller had met with an accident, having exploded her boiler, or something of that sort, and she was then on the St. Clair flats. The consideration of that purchase was twelve hundred dollars, I think; I speak from memory, but I am quite sure that was the price. I gave a note for thirty or sixty days for the purchase money. I delivered the note to Mr. Strong, but do not recollect certainly for what company it was delivered. I received evidence in writing from him of the sale. The paper hereto annexed, marked Exhibit C, is hereby produced by the witness, about which he says: This is a true and correct copy of the paper delivered to me by Mr. Strong on that sale; I have the original in my possession, but am unwilling to part with it for the reason that I may wish to use it in subsequent business transactions. After receiving the certificate of purchase, of which this paper, Exhibit C, is a copy, I sent a steamer up after the wheat. It was necessary for the captain of the steamer or lighter which I sent to have an order for the wheat. I sent him to Mr. Strong for the order, or at any rate

I took such steps that the order was procured from the captain of the Mohawk; and I afterwards learned that the order was all right. The steamer or lighter which went up for me to the Mohawk took off one or two loads, and then towed the Mohawk down to Detroit with the balance of her cargo on board. She was engaged in that business either five or six days, I am not certain which. After the Mohawk was towed down to Detroit I sent a portion of her cargo down to Buffalo on board her. I do not remember that anything was said to me by Mr. Strong or any one else about cancelling the sale after I had made the purchase. There was no conversation on that subject, to my recollection, and I am very sure I should have remembered it had there been any. There was nothing said to me, to my recollection, about sending for the steamer or lighter and bringing her back. I do not think any such thing occurred, for, to my recollection, there was never anything said or done about cancelling or heading off the sale. The Mutual Insurance Company of Buffalo, after that sale to me, sued me on the note which I gave in payment for the wheat. The company afterwards demanded and collected of me one hundred dollars or upwards, in addition to the purchase money to be paid by me for the wheat; I do not recollect the precise extent of the charge, but they claimed it as a general average, or something of that kind, and finally I paid it.

F. E. PHELPS.

Exhibit A.—H. D. Rheatt.

DETROIT, *Nov.* 12*th*, 1860.

The Mutual Insurance Company of Buffalo have sold to Mr. F. E. Phelps the remaining grain in the Mohawk; you will therefore let him or his agent go in and take it.

THOMAS S. BLACKMAN,
Commissioner.

Exhibit B.—Thomas S. Blackman, Commissioner.

44 DETROIT, *Nov.* 12*th*, 1860.

To Jno. W. Strong, [by telegraph from Buffalo, 13, 1860:]

Yours of twelfth (12th) received. Sale of grain all right.

A. A. EUSTAPHIEVE.

Exhibit C.—Thomas S. Blackman, Commissioner.

DETROIT, *Nov.* 12*th*, 1860.

This is to certify that the Mutual Insurance Company of Buffalo has this day sold to F. E. Phelps the balance of grain on the propeller Mohawk, as she now lies sunk on the flats of Lake St. Clair.

(Signed) J. W. STRONG, *Agent.*

DAVID DOWS AND AMMI DOWS
vs.
THE PROPELLER MOHAWK.

The deposition of Harvey D. Pheatt, taken the 13th day of July, A. D. 1860, before Azariah T. Galt, notary public, at Chicago, on the part of the respondents.

Harvey D. Pheatt, being first duly sworn, deposes and says: I am master of the propeller Mohawk, and was master at the time she was grounded on St. Clair flats, in Nov., 1860, and when she had the cargo of grain about which is the subject of this suit. I arrived at Newport, on the St. Clair river, about 9 o'clock Monday night. I know Jeremiah S. Saunders; he resided at Newport. He came aboard of my propeller, the Mohawk, at that place of my invitation. I asked him to go down with me to the flats; that I wanted to get over that night. I wanted him to put up his range light at the flats. I think Capt. Saunders has the job of putting down the buoys on the flats in the spring of the year. He at that time put up range lights for those that wanted him to. These range lights are a little above the lights at the mouth of the St. Clair river. The range lights are placed there by Saunders as a private enterprize; he receives payment for this trouble by private contribution. I assumed that these lights were not lighted when I arrived at Newport, and upon that assumption I stopped there for the purpose of getting him to light them. He, with his men, went on board for that purpose; he did not go on board for any other purpose that I am aware of. He had nothing to do with our boat as pilot. I am a pilot myself. I have been acquainted with the navigation over the St. Clair flats for twenty-six or twenty-seven years; that is, the old flats. I was well acquainted with that channel in November, 1860, and knew all about it. The year the accident happened I had passed over that channel twenty-two times; the year previous several times. I had not been in the habit of employing Saunders as a pilot during the time I navigated this channel. I frequently told him I did not want any pilot. This was in answer to him when he made applications to act as pilot. A part of the channel is natural and part artificial. At the time this
45 accident happened we were in the artificial part and the straight part of the channel, about five or six hundred yards from Lake St. Clair. We were within about three lengths of our propeller to the Harriet Ross when we first saw her; that is to say, before we first saw her exact position—that is about six hundred feet. She lay diagonally across the channel. We could not tell at that time whether she was lying at anchor or whether an accident had happened to her, until we got close enough to ascertain that she was not aground. She so obstructed the channel as to impede our passage, but I thought we could get around her stern, and tried to do it. There was some doubt about our getting around. I made the attempt to get around, hoping that I should succeed. The consequence was that the vessel brought up against the east bank of the channel. The propeller became stranded there. I deemed that that

was the only safe course for me to take under all the circumstances. There was a current in the channel. We had a heavy load. There was no suggestion made to me by any one to run down against the Harriet Ross and push her out of the way. It would not have been safe and prudent seamanship to have done this. In the night time it is difficult to tell just how fast your boat is going when you are running under a check. There would be great danger of damaging your own boat, and also the vessel. There was danger in attempting to go in front of the Harriet Ross that we should strike against her jib-boom. and her chain and anchor being still further out, and the water was shoally. Jerry Saunders was aboard of the propeller at this time; he did not have anything to do with the management of the propeller. He was not in consultation with me in regard to the management of the boat; that is to say, I did not take his advice, as as I was acting as my own pilot. Jerry Saunders understood very well that I did not want any pilot over the St. Clair flats. I never knew Saunders as having had anything to do with steam vessels. I supposed that when Saunders came on board that he was going with his men to put up the range lights, and that he was going off with his men. After I came to Detroit, after the accident, I saw a man by the name of Strong. He came to me in his office with an order, I think, in his own handwriting, to get me to sign it; it was to deliver the wheat to a man by the name of Phelps. I think Mr. Phelps sent for the wheat the same day the order was given. I should think there was about eight thousand bushels of wheat, wet and dry together, delivered on the flats, and I think there was some four or five thousand bushels delivered at Detroit. The balance of the wheat was taken to Buffalo on the propeller Mohawk under an arrangement with Mr. Phelps. He made a contract with me to take it to Buffalo; I think the rate of freight was five or six cents a bushel. After signing this order and giving it to Strong I saw him several times. My impression is that it was the next day after signing the order that I saw Strong about the freight on the Mohawk. He said that Mr. Eutaphieve had telegraphed him from Buffalo not to have anything to do with the wheat if the propeller charged pro rata freight.

46 Mr. Strong, myself, and George Bryant talked the matter over, and concluded to let the freight be an after consideration, and then everything went on as before.

Cross-examination.

By Mr. Rae :

At the time this accident happened I was a stockholder in the transportation company who owned the Mohawk. I had sixty-six shares, worth 50 dollars a share. I am not a stockholder now. I think it is about six weeks or two months since I sold a portion of it, the balance I sold about twenty days ago. I sold six shares to L. H. Rumsell, and the balance to John Allen, the president of the company, about twenty days ago.

Int. Did you sell this stock for the purpose of becoming a witness in this case ?

Ans. I sold it in order that I might come forward on the witness stand and do justice to the Western Transportation Company, being advised that under the laws of Illinois I could not be a witness without doing so. I got forty-five dollars a share from John Allen, and took his paper on demand. I have not received any money on that paper. I think the market value of the stock when I sold was forty-five dollars a share, and could get no more.

I think the map now shown me of the St. Clair flats, marked Exhibit A, is pretty good. The place marked A on the map is about the place where the accident occurred. We were going out of the channel when the accident occurred. Our vessel boiler exploded about two hours after the boat had stranded, and it sunk, and the goods were damaged. I do not recollect any particular words that Jerry Saunders spoke to me. He might have told me to go down slowly against the schooner and go around the stern. At the time I had the conversation with Strong I did not see the telegraph referred to above, but he told me the substance of it; that he was not to touch the wheat if we claimed pro rata freight.

Int. What was your idea about the freight?

(Question objected to by Mr. Hubbel.)

Ans. My idea was that the insurance company was going to take the wheat and sell it and make the most of it. I supposed, of course, that we were relieved from all liability.

(Mr. Rae objects to the witness on the ground of interest.)

H. D. PHEATT.

(Here follows map, marked page 46.)

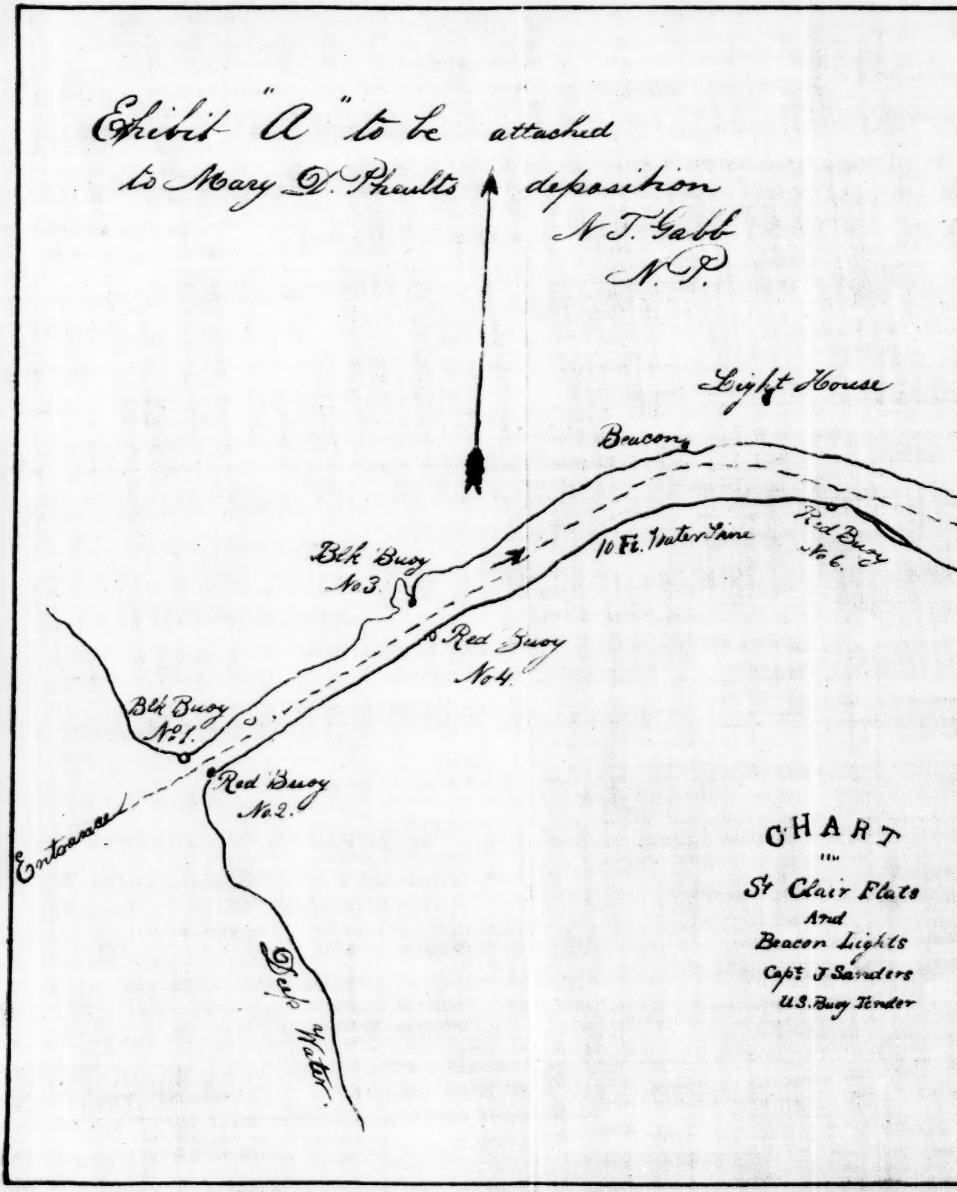
And afterwards, to wit, on the 30th day of September, A. D. 1863, in the record of the proceedings of said court in said cause, is the following entry:

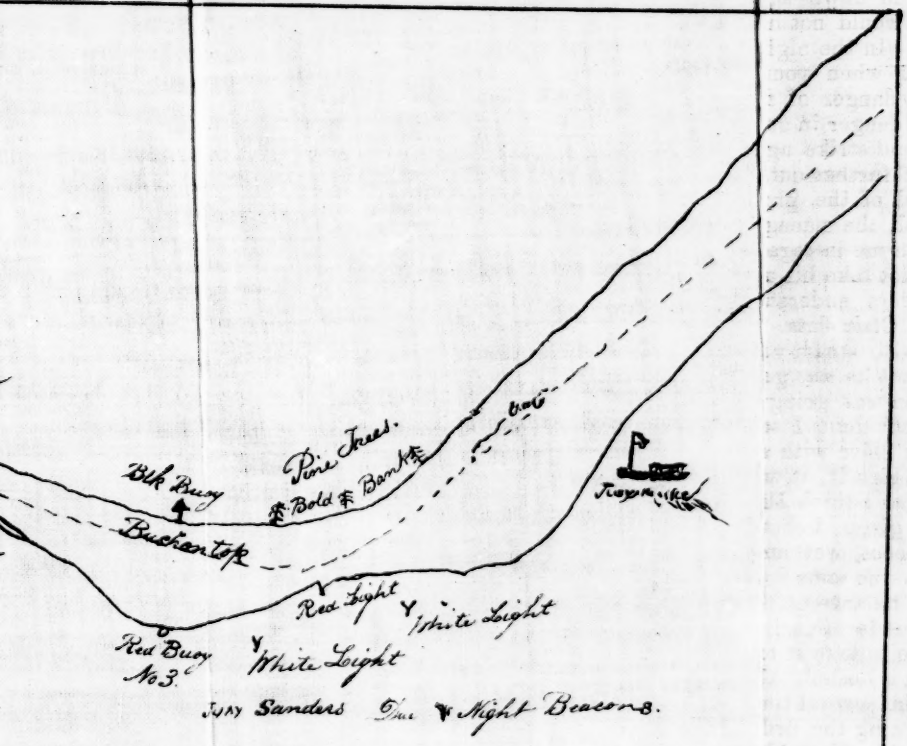
DAVID DOUS, AMMI DOUS, and JOHN D. MUIR
v.
PROPELLER MOHAWK. } Libel.

Now come the parties, by their proctors, and the court having considered, and being now fully advised upon the matters heretofore submitted herein, pronounces for the respondent.

47 It is thereupon considered and adjudged by the court that the libel be dismissed without prejudice, at the costs of the libellants, and that the respondents have and recover of the libellants their costs herein to be taxed, and that execution issue therefor against said libellants and their stipulators, and the libellants, by their proctor, pray an appeal to the Circuit Court.

And afterwards, to wit, on the 3d day of October, A. D. 1863, the said libellants, by their proctor, filed in the clerk's office of said court for the district aforesaid their appeal, in the words and figures following, to wit:


Exhibit "A" to be attached
to Mary D. Thaults deposition
N. T. Gabb
N. P.
Light House
Beacon
Red Buoy
No 6.
10 Ft. Water Line
Blk Buoy
No 3.
Red Buoy
No 4.
Blk Buoy
No 1.
Red Buoy
No 2.
Entrance
Deep Water.
CHART
of
St Clair Flats
And
Beacon Lights
by
Capt J Sanders
U.S. Buoy Tender



No 314 Joshua Burnell &c
vs
The Republic Mohawk
page 46

Circuit Court of the United States for the northern district of Illinois.

THE CHICAGO FIRE AND MARINE INSURANCE Company
vs.
THE PROPELLER MOHAWK, WESTERN TRANSportation Company, claimants.

DAVID AND AMMI DOUSE *et al.*
vs.
THE SAME.

The appeal of the above-named appellants respectfully showeth: That on or about the 29th day of October, 1862, the above-named libellants, "The Chicago Fire and Marine Insurance Company" and "David and Ammi Dowse, and John D. Muir," trading as D. & A. Dowse & Co., exhibited their libel in the District Court of the United States for the northern district of Illinois against the appellants, each claiming over fifty dollars, praying, among other things, for the reason set forth in the libel, that these appellants might be condemned to pay the demands of said libellants, the libel having been consolidated by order of the honorable District Court, and amended. That process issued out of said court having been served on the respondents, and they having filed their separate answers to said libel in said District Court, praying that the said libel be dismissed with the costs in that behalf, as by reference to said libel and the said answers may more fully appear; that the said cause came on to be heard before the honorable Thomas Drummond, judge of the said district court, on or about the 10th day of Jnly, D. D. 1863, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties; and the judge having advised thereon, on the 30th day of September, A. D. 1863, made a decree or sentence in said court, whereby it was, among other things, sentenced and decreed than the libel filed in this cause be dismissed without prejudice.

And these libellants are advised and insist that these decrees are erroneous, inasmuch as the libellants were entitled to a decree in the premises for the damage claimed in said libel. And the appellants, for these and other reasons, appeal from the whole of the said
48 decree in favor of said respondents to the present Circuit Court, as per stipulation, to be held in the said district, to have the , and on the said appeal they intend to make more allegations, and introduce the same and other proofs, to be introduced to the said Circuit Court, and they pray that the said decree and every part thereof may be reversed, with cost, and such other decrees thereon made as to the said Circuit Court shall seem just, and that the said appellees be condemned to pay to these appellants their costs and damages in the premises.

ROB'T RAE, *Proctor for Libellants.*

Indorsed: Filed Oct. 3d, 1863. William Bradley, clerk.

Appeal in bond.

Whereas an appeal has been taken to this court from the district of the United States in the northern district of Illinois, in a certain cause wherein the Chicago Fire and Marine Insurance Company and David and Ammi Douse and are libellants, against the propeller Mohawk, her boats, &c., the Western Transportation Company are claimants, and the said appellants have been ordered to give security in the sum of five hundred dollars for the payment of all damages and costs on the appeal to this court and in the Supreme Court:

Now, therefore, the stipulators undersigned hereby stipulate, in the saik sum of five hundred dollars, to pay all damages and costs on the appeal in this court and in the Supreme Court, in case such appeal shall intervene.

JOSHUA BARRELL.
SILAS PRATT.

Taken and acknowledged this 2d day of Oct., 1863.
R. RAE, *U. S. Com'r.*

U. S. A. *Northern District of Ill. ss:*

Silas Pratt, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth $1,000 dollars over all his debts and liabilities.

SILAS PRATT.

Sworn and subscribed before me this 2d day of Oct., A. D. 1863.
R. RAE, *U. S. Com'r.*

Indorsed: Bail approved. Bates & Towslee, proctor for def's. Filed Oct. 3d, 1863. Wm. H. Bradley, cl'k.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the District Court of the United States for the the northern district of Illinois, do hereby certify the foregoing to be a true transcript of the record of the District Court of the United States for the northern district of Illinois in the
49 cause wherein David Dows *et al.* are the libellants, and the propeller Mohawk respondent, the Western Transportation Company claimant, as the same appears from the records of said court in said cause, and made in pursuance to the fifty-third rule of the Supreme Court, adopted December term thereof, A. D. 1854.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Chicago, this twelfth day of October, A. D. 1863, and of our independence the 88th year.

[SEAL.] WM. H. BRADLEY, *Cl'k.*

Endorsed: Filed Oct. 12, 1863. Wm. H. Bradley, cl'k.

On this day, to wit, the 23d day of November, A. D. 1863, came Joshua Barrell, and filed in said clerk's office his petition in said entitled causes, which said petition is in the words and figures, following, to wit:

To the honorable judge of the United States Circuit Court for the northern district of Illinois, in admiralty:

The petition of Joshua Barrell in the matter of the Chicago Fire and Marine Insurance Company and David Douse *et al.* against the propeller Mohawk, in a case of contract of affreightment civil and maritime, now pending on appeal from the United States district court for this district, respectfully represents: That he is the party having the equitable interest in said causes on behalf of the libellants, and that it appears by stipulation on file in said causes that said libellants were, at the time of the disaster mentioned in said libel, insured in the Mutual Insurance Company of Buffalo upon the wheat mentioned in said libel, and that said libellants, upon information of said disaster reaching the agents of libellants at Buffalo, the agent of the owners of said wheat immediately abandoned the same to the Mutual Insurance Company of Buffalo, who accepted the abandonment so made, and paid the loss to the owners of the wheat; all of which will more fully appear by said stipulation now on file.

And your petitioner would further represent that on or about the 1st day of July, 1862, the Mutual Insurance Company of Buffalo, in and for a valuable consideration, assigned the certificates of insurance in which said owners of said cargo were insured as aforesaid to your petitioner, who is now the bona fide holder thereof, and entitled to all choses of action accruing to the Mutual Insurance Company of Buffalo by reason of the payment of said loss, said damage to said cargo, or by reason of said certificates of insurance.

Wherefore, your petitioner prays that said court would be pleased to make an order admitting petitioner as the dominus litis in said cause, and to intervene for his interest therein, according to the 34th rule in admiralty of the Supreme Court in such cases made and provided.

JOSHUA BARRELL.

Sworn and subscribed before me this 19 day of Oct. A. D. 1863.
R. RAE, *U. S. Com'r.*

50 Indorsed: Filed Nov. 23, 1863. Wm. H. Bradley, cl'k.

On this day, to wit, the 23d day of October, in the adjourned October term, A. D. 1863, of said Circuit Court, in the record of the proceedings thereof in said entitled causes, is the following entry, to wit:

THE CHICAGO MARINE AND FIRE INSURANCE Company *v.* PROPELLER MOHAWK; and DAVID DOUSE, AMMI DOUSE, and JOHN D. Muir *v.* PROPELLER MOHAWK.	Appeal.

Now come the parties, by their proctors, and on motion, it is ordered by the court that the above-entitled causes be consolidated; and, on petition filed, it is further ordered that Joshua Barrell be subrogated to all the rights of the libellants herein, and leave is also given to file an amended libel, and the respondents are ruled to file their answer by the first day of December next; and this cause is continued, upon affidavit filed, to the next term of this court, the respondents to pay proctor's fee in the sum of fifty dollars.

On the same day, to wit, the 23d day of November, A. D. 1863, came Joshua Barrell, and filed an amended libel in said causes, which is as follows:

To the Hon. David Davis, judge of the United States Circuit Court for the northern district of Illinois, sitting in admiralty:

The libel of Joshua Barrell, who, by order of the honorable court made on the day of October, A. D. 1863, was subrogated to the rights of the libellants, and made dominus litis in the matter now pending in said court of the Chicago Fire and Marine Insurance Company, a corporation by virtue of the laws of the State of Illinois, and David Dows, Ammi Dows, and John D. Myers, trading as A. Dows & Co., against the propellor Mohawk, her engines, boilers, machinery, boats, tackle, apparel, and furniture, (the Western Transportation Company claimant,) in a cause of contract of affreightment, civil and maritime, alleges as follows:

First. That said propeller Mohawk, which was lying at the port of Chicago at the time the original libel was filed in the cause, was and is a vessel of twenty tons burthen and upwards, and at the time when said cause of action hereinafter stated and set forth arose was, and is now, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between points and places in different States, upon the lakes and the navigable waters connecting the same.

51 Second. That on or about the 31st day of October, A. D. 1860, the Chicago Fire and Marine Insurance Company, and A. Dows & Co., shipped a certain quantity of grain on board the propeller Mohawk, than lying at the port of Chicago, in the State of Illinois, to wit:

The Chicago Fire and Marine Insurance Company, ten thousand bushels of No. 1 spring wheat, and D. &. A. Dows & Co., ten thousand two hundred and seventeen $\frac{45}{60}$ bushels of No. 1 spring wheat,

to be transferred and conveyed on board said propeller from the port of Chicago to the port of Buffalo, in the State of New York, and to be delivered by the said propeller Mohawk safely at said port of Buffalo to the respective consignees of said libellants, upon paying the freight of fifteen cents per bushel for each and every bushel so delivered as aforesaid, according to the tenor and effect of the bill of lading made, signed, and delivered by the agent of said propeller Mohawk to said libellants in the premises, copies of which are annexed to the original libel filed in this cause.

Third. That said twenty thousand two hundred and seventeen $\frac{45}{60}$ bushels of wheat was, at the time it was delivered by the said libellants on board said propeller Mohawk as aforesaid, in good condition, and of the value of twenty thousand two hundred and eighteen dollars; that the said wheat was at the time of its delivery to said propeller for transportation as aforesaid, the property of said libellants, and of the value above stated.

Fourth. That said propeller, being in good and seaworthy condition, left the port of Chicago upon the voyage aforesaid with the the wheat on board, and after the said voyage had been more than half completed and performed in safety, and while so engaged in the prosecution of said voyage, on the 9 day of Nov., 1860, was carelessly and unskilfully grounded upon St. Clair flats, thirty miles from Detroit, in the State of Michigan, and in the effort to get her off the said propeller became disabled by the careless and negligent bursting of her boiler, and then and there sunk with said cargo on board, and all the wheat except 1,100 bushels was damaged by the sinking of the said propeller.

Fifth. That upon information of the said disaster reaching Buffalo, the agent of the owner of said wheat immediately abandoned the same to the Mutual Insurance Company of Buffalo, said company having insured the same; the said insurance company accepted the abandonment so made, and paid the loss to the owners of the wheat; that said insurance company, on the 1st day of July, A. D. 1862, assigned the certificate of insurance on which said owners of said cargo were insured, as aforesaid, to Joshua Barrel, the present libellant in this cause.

Sixth. That said eleven hundred bushels of wheat, which was the only wheat of said cargo not damaged as aforesaid, was never delivered to the consignee of said wheat, or any other person or persons, but is now unlawfully detained by the owner of said propeller.

Seventh. That said shippers and insurance company have, by reason of the damage to said wheat as aforesaid, and the unlawful detention of said sound wheat, suffered damage in the sum of
52 twenty thousand two hundred and 18 dollars, which is now due and unpaid this libellant, Barrel, and which has been demanded of respondents, but which they neglect and refuse to pay the same or any part thereof; that all and singular these premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore libellant prays that the honorable Circuit Court would

be pleased to decree payment of said damages, together with interest from the date of loss, and all costs in the premises to be made by the respondent, and to grant such other and further relief as law and justice may require.

JOSHUA BARRELL.

Sworn and subscribed before me this 19 day of Oct., A. D. 1863.
R. RAE, *U. S. Com'r.*

Indorsed: Filed Nov. 23, 1863. Wm. H. Bradley c'lk.

On this day, to wit, the first day of December, A. D. 1863, came the Western Transportation Company, claimant and owner of said propeller Mohawk, by Bates & Touslee, its proctors, and filed in said clerk's office its answer in said entitled causes, which said answer is in the words and figures as follows:

United States Circuit Court, northern district of Illinois, in admiralty.

THE CHICAGO FIRE AND MARINE INSURANCE Company *ag'st* THE PROPELLER MOHAWK, HER BOATS, TACKLE, apparel, &c.

DAVID DOWS, AMMI DOWS, AND JOHN D. MAIRS, *ag'st* THE SAME.

To the honorable David Davis and Thomas Drummond, judges of the United States District Circuit Court in and for the northern district of Illinois:

The answer of the Western Transportation Company claimant and owner of the said propeller Mohawk, her boats, tackle, apparel, furniture, engines, machinery, &c., to the libel of Joshua Barrell, heretofore filed in the above-entitled causes, doth allege and articulately propound as follows:

First. That it, the said claimant, now and at all the several times hereinafter mentioned was and is a corporation duly created, organized, and existing under the laws of the State of New York, having its principal office and place of business in the last-mentioned State, and not elsewhere, and that it was and is the owner of
53 the said propeller Mohawk, her boats, tackle, apparel, furniture, machinery, engines, &c., at all the several times herein mentioned.

Second. And as to the several matters and things alleged in the first article of the said amended libel, the respondent admits the same to be true in substance and matter of fact.

Third. And as to the several matters and things in the second

article of said amended libel stated and set forth, the respondent denies the same in manner and form as the same are therein stated and set forth.

Fourth. And as to the several matters and things in the third article of said amended libel stated and charged, the respondent denies that the wheat therein mentioned was the property of the libellants, as therein stated, but it admits that the said wheat was of the value claimed in the said third article of the said libel, and that the same was in good condition at the time of its delivery on board the said propeller.

Fifth. And as to the several matters and things in the fourth article of the said amended libel stated and charged, the respondent admits that the said propeller, being in good and seaworthy condition, left the port of Chicago upon a voyage from Chicago to Buffalo, with the certain wheat on board which is more particularly mentioned and referred to in the bills of lading, copies of which are annexed to the original libels filed in these causes respectively, and that after the said voyage had been more than half completed and performed in safety, and while so engaged in the prosecution of said voyage, on or about the ninth day of November, 1860, the said propeller grounded upon St. Clair flats, and in the effort to get her off, the said propeller became disabled by the bursting of her boiler, and then and there sunk with the said cargo on board, and all of the said wheat except eleven hundred bushels was damaged by the sinking of the propeller; but the respondent denies that the grounding of the propeller was caused by the carelessness or unskilfulness of the officers or crew of the propeller, or of the servants or agents of the respondent. And the respondent further denies that the bursting of the boiler was caused by the carelessness or negligence of the officers or crew of the said propeller, or of the respondent, or any of of its officers, servants, or agents; on the contrary thereof, the said repondent says that the grounding of the said propeller was owing to and caused by the dangers and perils of navigation, and not otherwise, and that the bursting of the said boiler and all of the supposed and pretended damage to the said wheat was caused by the dangers and perils of navigation, and not otherwise.

Sixth. And as to the several matters and things in the fifth article of the said libel stated and charged, the respondent admits the same to be true in substance and matter of fact, except so much and such parts thereof as alleges that the said insurance company did, at the time in the said fifth article stated, or at any other time, assign the certificate of insurance therein mentioned to the said Joshua Barrell, as to which, and to each and every part thereof, the respon-
54 dent denies the same in manner and form as the same are therein stated and set forth.

Seventh. And as to the several matters stated and charged in the sixth article of the said libel, the respondent admits that the eleven hundred bushels of wheat therein mentioned was never delivered to the consignee of the said wheat, or other person or persons, but it denies that the same is unlawfully detained by it, the said respondent;

on the contrary thereof, the said respondent says that at all times hitherto it has been, was, and still, is ready and willing to deliver the same to the owner or consignee of the said wheat upon payment of its claim and lien thereon for the transportation of the wheat mentioned in the bills of lading hereinbefore mentioned.

Eighth. And as to the several matters and things in the seventh article of the said libel stated and charged, the said respondent denies the same, and each and every of them, in manner and form as the same are therein stated and set forth.

Ninth. And further answering the said amended libel, the respondent says that the two certain parcels of wheat mentioned and referred to in the bills of lading, copies of which are annexed to the original libels filed in this cause in the name of the Chicago Fire and Marine Insurance Company, and in the name of David Dows and Ammi Dows, were shipped on board the said propeller by the said Isaac Sherwood and Frederick N. Bronson, who were then the owners thereof respectively, and that the said N. K. Fairbanks mentioned in the said bills of lading having made certain advances of money to the said Bronson and Sherwood respectively, either upon his own account or the account of other persons as their agent or agents, it was then and there agreed by and between the said Fairbanks and Sherwood and Bronson that the said Fairbanks should have a lien upon and the control of the said wheat for the purpose of securing the repayment of such advances, and that the said Sherwood and Bronson should procure the same to be insured against the dangers and perils of navigation for the benefit of the said Fairbanks or the person or persons for whom the said advances were made, and should transfer and assign to the said Fairbanks the policies or certificates of insurance as further security. And thereupon, and in pursuance of the said agreement between the said Bronson and Sherwood and the said Fairbanks, the bills of lading hereinbefore referred to were made out and delivered to the said Fairbanks, at the request and by the direction of the said Bronson and Sherwood respectively, for the purpose of such security, and not otherwise, and that the said Bronson and Sherwood did thereupon, in further pursuance of such agreement, procure the said two parcels of wheat to be insured in the Mutual Insurance Company of Buffalo against the perils and dangers of navigation on the said trip or voyage from Chicago to Buffalo, and that policies or certificates of insurance were thereupon assigned or transferred to the said Fairbanks by way of further security, and not otherwise. And the respondent further says that the advances so made by the said Fairbanks, whether made upon his own account or upon the account of the said the Chicago Fire and Marine In-
55 surance Company and the said David Dows and Ammi Dows, or otherwise, to the said Bronson and Sherwood respectively, were fully paid and satisfied before the commencement of this suit, and before the filing of the original libels in the name of the said the Chicago Fire and Marine Insurance Company, and in the name of the said David Dows and Ammi Dows, or of the amended libel in the name of the said Joshua Barrell, libellant.

On this day, to wit, the 23d day of November, A. D. 1863, came Joshua Barrell, and filed in said clerk's office his petition in said entitled causes, which said petition is in the words and figures, following, to wit:

To the honorable judge of the United States Circuit Court for the northern district of Illinois, in admiralty:

The petition of Joshua Barrell in the matter of the Chicago Fire and Marine Insurance Company and David Douse *et al.* against the propeller Mohawk, in a case of contract of affreightment civil and maritime, now pending on appeal from the United States district court for this district, respectfully represents: That he is the party having the equitable interest in said causes on behalf of the libellants, and that it appears by stipulation on file in said causes that said libellants were, at the time of the disaster mentioned in said libel, insured in the Mutual Insurance Company of Buffalo upon the wheat mentioned in said libel, and that said libellants, upon information of said disaster reaching the agents of libellants at Buffalo, the agent of the owners of said wheat immediately abandoned the same to the Mutual Insurance Company of Buffalo, who accepted the abandonment so made, and paid the loss to the owners of the wheat; all of which will more fully appear by said stipulation now on file.

And your petitioner would further represent that on or about the 1st day of July, 1862, the Mutual Insurance Company of Buffalo, in and for a valuable consideration, assigned the certificates of insurance in which said owners of said cargo were insured as aforesaid to your petitioner, who is now the bona fide holder thereof, and entitled to all choses of action accruing to the Mutual Insurance Company of Buffalo by reason of the payment of said loss, said damage to said cargo, or by reason of said certificates of insurance.

Wherefore, your petitioner prays that said court would be pleased to make an order admitting petitioner as the dominus litis in said cause, and to intervene for his interest therein, according to the 34th rule in admiralty of the Supreme Court in such cases made and provided.

JOSHUA BARRELL.

Sworn and subscribed before me this 19 day of Oct. A. D. 1863.
R. RAE, *U. S. Com'r.*

50 Indorsed: Filed Nov. 23, 1863. Wm. H. Bradley, cl'k.

On this day, to wit, the 23d day of October, in the adjourned October term, A. D. 1863, of said Circuit Court, in the record of the proceedings thereof in said entitled causes, is the following entry, to wit:

THE CHICAGO MARINE AND FIRE INSURANCE Company *v.* PROPELLER MOHAWK; and DAVID DOUSE, AMMI DOUSE, and JOHN D. Muir *v.* PROPELLER MOHAWK.	Appeal.

Now come the parties, by their proctors, and on motion, it is ordered by the court that the above-entitled causes be consolidated; and, on petition filed, it is further ordered that Joshua Barrell be subrogated to all the rights of the libellants herein, and leave is also given to file an amended libel, and the respondents are ruled to file their answer by the first day of December next; and this cause is continued, upon affidavit filed, to the next term of this court, the respondents to pay proctor's fee in the sum of fifty dollars.

On the same day, to wit, the 23d day of November, A. D. 1863, came Joshua Barrell, and filed an amended libel in said causes, which is as follows:

To the Hon. David Davis, judge of the United States Circuit Court for the northern district of Illinois, sitting in admiralty:

The libel of Joshua Barrell, who, by order of the honorable court made on the day of October, A. D. 1863, was subrogated to the rights of the libellants, and made dominus litis in the matter now pending in said court of the Chicago Fire and Marine Insurance Company, a corporation by virtue of the laws of the State of Illinois, and David Dows, Ammi Dows, and John D. Myers, trading as A. Dows & Co., against the propellor Mohawk, her engines, boilers, machinery, boats, tackle, apparel, and furniture, (the Western Transportation Company claimant,) in a cause of contract of affreightment, civil and maritime, alleges as follows:

First. That said propeller Mohawk, which was lying at the port of Chicago at the time the original libel was filed in the cause, was and is a vessel of twenty tons burthen and upwards, and at the time when said cause of action hereinafter stated and set forth arose was, and is now, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between points and places in different States, upon the lakes and the navigable waters connecting the same.

51 Second. That on or about the 31st day of October, A. D. 1860, the Chicago Fire and Marine Insurance Company, and A. Dows & Co., shipped a certain quantity of grain on board the propeller Mohawk, than lying at the port of Chicago, in the State of Illinois, to wit:

The Chicago Fire and Marine Insurance Company, ten thousand bushels of No. 1 spring wheat, and D. &. A. Dows & Co., ten thousand two hundred and seventeen $\frac{45}{60}$ bushels of No. 1 spring wheat,

to be transferred and conveyed on board said propeller from the port of Chicago to the port of Buffalo, in the State of New York, and to be delivered by the said propeller Mohawk safely at said port of Buffalo to the respective consignees of said libellants, upon paying the freight of fifteen cents per bushel for each and every bushel so delivered as aforesaid, according to the tenor and effect of the bill of lading made, signed, and delivered by the agent of said propeller Mohawk to said libellants in the premises, copies of which are annexed to the original libel filed in this cause.

Third. That said twenty thousand two hundred and seventeen $\frac{45}{60}$ bushels of wheat was, at the time it was delivered by the said libellants on board said propeller Mohawk as aforesaid, in good condition, and of the value of twenty thousand two hundred and eighteen dollars; that the said wheat was at the time of its delivery to said propeller for transportation as aforesaid, the property of said libellants, and of the value above stated.

Fourth. That said propeller, being in good and seaworthy condition, left the port of Chicago upon the voyage aforesaid with the the wheat on board, and after the said voyage had been more than half completed and performed in safety, and while so engaged in the prosecution of said voyage, on the 9 day of Nov., 1860, was carelessly and unskilfully grounded upon St. Clair flats, thirty miles from Detroit, in the State of Michigan, and in the effort to get her off the said propeller became disabled by the careless and negligent bursting of her boiler, and then and there sunk with said cargo on board, and all the wheat except 1,100 bushels was damaged by the sinking of the said propeller.

Fifth. That upon information of the said disaster reaching Buffalo, the agent of the owner of said wheat immediately abandoned the same to the Mutual Insurance Company of Buffalo, said company having insured the same; the said insurance company accepted the abandonment so made, and paid the loss to the owners of the wheat; that said insurance company, on the 1st day of July, A. D. 1862, assigned the certificate of insurance on which said owners of said cargo were insured, as aforesaid, to Joshua Barrel, the present libellant in this cause.

Sixth. That said eleven hundred bushels of wheat, which was the only wheat of said cargo not damaged as aforesaid, was never delivered to the consignee of said wheat, or any other person or persons, but is now unlawfully detained by the owner of said propeller.

Seventh. That said shippers and insurance company have, by reason of the damage to said wheat as aforesaid, and the unlawful detention of said sound wheat, suffered damage in the sum of
52 twenty thousand two hundred and 18 dollars, which is now due and unpaid this libellant, Barrel, and which has been demanded of respondents, but which they neglect and refuse to pay the same or any part thereof; that all and singular these premises are true, and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore libellant prays that the honorable Circuit Court would

be pleased to decree payment of said damages, together with interest from the date of loss, and all costs in the premises to be made by the respondent, and to grant such other and further relief as law and justice may require.

JOSHUA BARRELL.

Sworn and subscribed before me this 19 day of Oct., A. D. 1863.
R. RAE, *U. S. Com'r.*

Indorsed: Filed Nov. 23, 1863. Wm. H. Bradley c'lk.

On this day, to wit, the first day of December, A. D. 1863, came the Western Transportation Company, claimant and owner of said propeller Mohawk, by Bates & Touslee, its proctors, and filed in said clerk's office its answer in said entitled causes, which said answer is in the words and figures as follows:

United States Circuit Court, northern district of Illinois, in admiralty.

THE CHICAGO FIRE AND MARINE INSURANCE Company
ag'st
THE PROPELLER MOHAWK, HER BOATS, TACKLE, apparel, &c.

DAVID DOWS, AMMI DOWS, AND JOHN D. MAIRS,
ag'st
THE SAME.

To the honorable David Davis and Thomas Drummond, judges of the United States District Circuit Court in and for the northern district of Illinois:

The answer of the Western Transportation Company claimant and owner of the said propeller Mohawk, her boats, tackle, apparel, furniture, engines, machinery, &c., to the libel of Joshua Barrell, heretofore filed in the above-entitled causes, doth allege and articulately propound as follows:

First. That it, the said claimant, now and at all the several times hereinafter mentioned was and is a corporation duly created, organized, and existing under the laws of the State of New York, having its principal office and place of business in the last-mentioned State, and not elsewhere, and that it was and is the owner of
53 the said propeller Mohawk, her boats, tackle, apparel, furniture, machinery, engines, &c., at all the several times herein mentioned.

Second. And as to the several matters and things alleged in the first article of the said amended libel, the respondent admits the same to be true in substance and matter of fact.

Third. And as to the several matters and things in the second

article of said amended libel stated and set forth, the respondent denies the same in manner and form as the same are therein stated and set forth.

Fourth. And as to the several matters and things in the third article of said amended libel stated and charged, the respondent denies that the wheat therein mentioned was the property of the libellants, as therein stated, but it admits that the said wheat was of the value claimed in the said third article of the said libel, and that the same was in good condition at the time of its delivery on board the said propeller.

Fifth. And as to the several matters and things in the fourth article of the said amended libel stated and charged, the respondent admits that the said propeller, being in good and seaworthy condition, left the port of Chicago upon a voyage from Chicago to Buffalo, with the certain wheat on board which is more particularly mentioned and referred to in the bills of lading, copies of which are annexed to the original libels filed in these causes respectively, and that after the said voyage had been more than half completed and performed in safety, and while so engaged in the prosecution of said voyage, on or about the ninth day of November, 1860, the said propeller grounded upon St. Clair flats, and in the effort to get her off, the said propeller became disabled by the bursting of her boiler, and then and there sunk with the said cargo on board, and all of the said wheat except eleven hundred bushels was damaged by the sinking of the propeller; but the respondent denies that the grounding of the propeller was caused by the carelessness or unskilfulness of the officers or crew of the propeller, or of the servants or agents of the respondent. And the respondent further denies that the bursting of the boiler was caused by the carelessness or negligence of the officers or crew of the said propeller, or of the respondent, or any of of its officers, servants, or agents; on the contrary thereof, the said repondent says that the grounding of the said propeller was owing to and caused by the dangers and perils of navigation, and not otherwise, and that the bursting of the said boiler and all of the supposed and pretended damage to the said wheat was caused by the dangers and perils of navigation, and not otherwise.

Sixth. And as to the several matters and things in the fifth article of the said libel stated and charged, the respondent admits the same to be true in substance and matter of fact, except so much and such parts thereof as alleges that the said insurance company did, at the time in the said fifth article stated, or at any other time, assign the certificate of insurance therein mentioned to the said Joshua Barrell, as to which, and to each and every part thereof, the respon-
54 dent denies the same in manner and form as the same are therein stated and set forth.

Seventh. And as to the several matters stated and charged in the sixth article of the said libel, the respondent admits that the eleven hundred bushels of wheat therein mentioned was never delivered to the consignee of the said wheat, or other person or persons, but it denies that the same is unlawfully detained by it, the said respondent;

on the contrary thereof, the said respondent says that at all times hitherto it has been, was, and still, is ready and willing to deliver the same to the owner or consignee of the said wheat upon payment of its claim and lien thereon for the transportation of the wheat mentioned in the bills of lading hereinbefore mentioned.

Eighth. And as to the several matters and things in the seventh article of the said libel stated and charged, the said respondent denies the same, and each and every of them, in manner and form as the same are therein stated and set forth.

Ninth. And further answering the said amended libel, the respondent says that the two certain parcels of wheat mentioned and referred to in the bills of lading, copies of which are annexed to the original libels filed in this cause in the name of the Chicago Fire and Marine Insurance Company, and in the name of David Dows and Ammi Dows, were shipped on board the said propeller by the said Isaac Sherwood and Frederick N. Bronson, who were then the owners thereof respectively, and that the said N. K. Fairbanks mentioned in the said bills of lading having made certain advances of money to the said Bronson and Sherwood respectively, either upon his own account or the account of other persons as their agent or agents, it was then and there agreed by and between the said Fairbanks and Sherwood and Bronson that the said Fairbanks should have a lien upon and the control of the said wheat for the purpose of securing the repayment of such advances, and that the said Sherwood and Bronson should procure the same to be insured against the dangers and perils of navigation for the benefit of the said Fairbanks or the person or persons for whom the said advances were made, and should transfer and assign to the said Fairbanks the policies or certificates of insurance as further security. And thereupon, and in pursuance of the said agreement between the said Bronson and Sherwood and the said Fairbanks, the bills of lading hereinbefore referred to were made out and delivered to the said Fairbanks, at the request and by the direction of the said Bronson and Sherwood respectively, for the purpose of such security, and not otherwise, and that the said Bronson and Sherwood did thereupon, in further pursuance of such agreement, procure the said two parcels of wheat to be insured in the Mutual Insurance Company of Buffalo against the perils and dangers of navigation on the said trip or voyage from Chicago to Buffalo, and that policies or certificates of insurance were thereupon assigned or transferred to the said Fairbanks by way of further security, and not otherwise. And the respondent further says that the advances so made by the said Fairbanks, whether made upon his own account or upon the account of the said the Chicago Fire and Marine In-
55 surance Company and the said David Dows and Ammi Dows, or otherwise, to the said Bronson and Sherwood respectively, were fully paid and satisfied before the commencement of this suit, and before the filing of the original libels in the name of the said the Chicago Fire and Marine Insurance Company, and in the name of the said David Dows and Ammi Dows, or of the amended libel in the name of the said Joshua Barrell, libellant.

Tenth. And further answering the said libel, the respondent says that the original libels filed in this court in the name of the said the Chicago Fire and Marine Insurance Company, and in the name of the said David Dows and Ammi Dows, were so filed, and the said suits or actions prosecuted without the knowledge, consent, or concurrence of the said pretended libellants, and that the said pretended libellants, that is to say, the said the Chicago Fire and Marine Insurance Company, and the said David Dows and Ammi Dows, nor any or either of them, have ever made or pretended to have any claim or cause of action against the said propeller, or against this respondent by reason of any matter or thing stated and set forth in the said original libels, or in the amended libel filed in the name of the said Joshua Barrell.

Eleventh. And further answering the said amended libel, this respondent says that upon the abandonment of the said wheat to it, the said the Mutual Insurance Company of Buffalo, as hereinbefore mentioned, did, with the assent of the said Bronson, Sherwood, Fairbanks, the Chicago Fire and Marine Insurance Company, and the said David Dows and Ammi Dows and John D. Mairs, composing the firm of David Dows & Co., respectively, assume the ownership and control of the wheat mentioned in the said bills of lading, and each and every part thereof; and the said respondent, and the officers and crew of the said propeller, did thereupon hold the said wheat as the agent and bailee of the said Mutual Insurance Company of Buffalo; that the said wheat was then on board the said propeller at the place of its detention, which was about thirty miles from the city of Detroit; that the said propeller was only temporarily disabled; that within a few days after the accident she was got off and taken to Detroit, and from thence to Buffalo, her place of destination, with about eight thousand bushels of the wheat on board, and that she arrived in Buffalo within two weeks from the time of the accident; that the place of detention was in the track of steamboats and vessels navigating the lakes between Chicago and Buffalo, and that the wheat could have been readily transhipped and sent forward to Buffalo by other vessels, in case it should have been found impracticable to have sent the same forward by the said propeller, but that the said the Mutual Insurance Company of Buffalo interposed and prevented the respondent and the master of the propeller from so doing, as is hereinafter stated and set forth.

Twelfth. And further answering, the respondent says that immediately upon accepting the said abandonment the said the Mutual Insurance Company of Buffalo did sell the said wheat remaining on board the said propeller, which included the entire two par-
56 cels mentioned in the said bills of lading, except about eleven hundred bushels which had been forwarded to Buffalo by the respondent by another vessel to one F. S. Phelps for a valuable consideration, and did then and there require the master of the said propeller to deliver all of the said wheat so remaining on board to the said Phelps, the purchaser thereof; and thereupon, and in pursuance of such direction and request, the master of the said propeller did then and there deliver to the said purchaser, at the place of detention,

eight thousand bushels of the said wheat, and upon the arrival of the said propeller at Detroit, within a few days thereafter, the said master delivered to the said purchaser eleven thousand and ninety bushels of the said wheat, making all the wheat included in the said two shipments, excepting the eleven hundred bushels hereinbefore mentioned. And afterwards the said purchaser reshipped on board the said propeller five thousand bushels of the said wheat, to be transported to and delivered at Buffalo upon her arrival on the said voyage.

Thirteenth. And further answering, the respondent says that the abandonment of the said wheat, and the acceptance thereof by the said insurance company, was made and accepted without consultation with the said respondent, its officers or agents.

Fourteenth. And further answering, the respondent says that upon the delivery of the said wheat to the purchaser thereof from the said insurance company, it became and was entitled to the freight stipulated in the bills of lading for the entire trip or voyage. And that in making such delivery it did not waive or release its right to the payment thereof; and that of the said wheat so shipped eleven hundred bushels still remains in the possession of the respondent, and was retained by it as security for the payment of the said freight, so far as the same will go; that the value of the said wheat is about eleven hundred dollars, and that the freight so due upon the shipments amounts to three thousand dollars; and after deducting the value of the said eleven hundred bushels of wheat, there still remains due to the respondent the sum of two thousand dollars or thereabouts, together with interest on that sum from the fifteenth day of November, one thousand eight hnndred and sixty-one.

Fifteenth. And further answering, the respondent says that soon after the said accident and the abandonment hereinbefore mentioned a question and controversy arose between the said the Mutual Insurance Company of Buffalo and this respondent in regard to the said accident; that it was then claimed by the said insurance company; that it was entitled to the possession of the eleven hundred bushels of wheat which had been sent forward from the place of detention at the time of the accident, under and by virtue of the said abandonment; that the said insurance company made no other claim or demand against the said propeller, or against the respondent as the owner thereof, by reason of the said accident or of the pretended damage to the wheat on board thereof, or of any other matter or thing growing out of or connected with the said wheat; that the said insurance company did afterwards commence a suit or
57 action in the Superior Court of Buffalo, that being a court of record and having jurisdiction of the persons and subject-matter of said suit or action against the said respondent, for the purpose of recovering the value of the said eleven hundred bushels of wheat hereinbefore mentioned, and making no further or other or different claim or demand whatsoever; that the said respondent appeared in said action and defended the same; that issue being joined therein the said suit or action proceeded to trial, and that

while the said suit or action was so pending in the said Superior Court of Buffalo, and before the same was finally disposed of in said court, some person or persons who are to the respondent unknown entered into a negotiation with the secretary of the said the Mutual Insurance Company of Buffalo with a view to procure an assignment or transfer to them, or for their benefit, of a claim or cause or causes of action which it was pretended or supposed had accrued to the said insurance company against the said respondent by reason of or growing out of the aocident to the said propeller, and which claim or cause or causes of action the said insurance company had given up and abandoned as unfounded and worthless, and which the officers of the said company had decided not to prosecute or insist upon as against the said respondent, and that such negotiations resulted in a pretended sale, assignment, and transfer by the secretary of the said insurance company to the said person or persons of some supposed or pretended claim, demand, cause or causes of action, which it was claimed and pretended had accrued to the said insurance company against the said respondent or against the said propeller by reason of or growing out of the aforementioned insurance and the accident to the said propeller and the pretended damage to the said wheat, besides and including the claim or cause of action which formed the subject-matter of the suit then pending in the Superior Court of Buffalo hereinbefore referred to; and that by direction of the said person or persons the said assignment was made in form to the said Joshua Barrell, the libellant named in the amended libel in this cause, and that it was and is under and by virtue of such pretended assignment and transfer that the said libels in this cause were respectively filed by the proctor for the said Barrell, and upon or under no different authority whatever. And this respondent in fact further says, that the said Barrell was and is a mere nominal party to the suit, and that he has allowed his name to be used by other person or persons for the mere purposes of this suit, and not otherwise. And this respondent in fact further says, that the consideration paid or assumed or pretended to be paid to the secretary of the said insurance company for the said assignment and transfer was merely nominal and did not exceed twenty-five hundred dollars; that such pretended assignment was not within the scope of the powers and duties of the said secretary, and that the same was not authorized by any resolution of the board of directors or trustees of said insurance company, and that the same was made by the said secretary without the authority of the said board of directors or by the authority of any officer of the said company who was authorized to make such assignment. And
58 further answering, the respondent says that the said assignment and transfer was so procured to be made to the said Joshua Barrell for the purpose of bringing a suit or action upon the same in this court and for no other purpose whatever, and that the same was so procured to be made after the said person or persons who negotiated therefor had been informed that the said insurance company had decided not to prosecute the claim or demand so pre-

tended to be assigned, and had abandoned the same as worthless and unfounded.

Sixteenth. And further answering, the respondent says that soon after making the said pretended assignment and transfer the two libels in the two original causes were filed by the proctor for the said Barrell in the name of the said David Dows and Ammi Dows as libellants in one suit, and in the name of the Chicago Fire and Marine Insurance Company on the other suit, and that each and both of said suits were so commenced without the knowledge, consent, or approbation of the parties named as libellants in the said suits or any or either of them, and that the same were so commenced and prosecuted with a view, on the part of the said Barrell and the person or persons for whose use and benefit he has allowed his name to be used, to procure the decree and judgment of this court in the name of the said parties as libellants, and to collect the same and appropriate the proceeds thereof to his or their own use.

Seventeenth. That all and singular the foregoing premises are true.

Wherefore the respondent prays that the said libel may be dismissed with costs, and that it may have such further or other or different order and relief in the premises as may to law and justice appertain, and as the court is competent to give in the premises.

THE WESTERN TRANSPORTATION CO.
By JNO. ALLEN, JR., *President.*

UNITED STATES OF AMERICA, *Northern District of New York:*

On this 28th day of November, A. D. 1863, personally appeared before me, at the city of Buffalo, in the district aforesaid, John Allen, jr., who, being duly sworn, says he is the president of the Western Transportation Company, the respondent named in the foregoing answer, and that the said answer is true in substance and matter of fact as he verily believes.

[SEAL,] GEO. GORHAM,
United States Commissioner, Northern District of New York.

BATES & TOWSLEE,
Proctors for Respondents.
GEO. C. BATES, *Advocate.*

Indorsed: Filed Dec. 1, 1863. Wm. H. Bradley, cl'k.

On this day, to wit, the 22d day of June, A. D. 1864, in the record of the proceedings of said court in said entitled causes is the following entry, to wit:

Appeal.

59 CHICAGO MARINE AND FIRE INSURance Company
vs.
PROPELLER MOHAWK;
and
DAVID DOUSE, AMI DOUSE, AND JOHN D. Muir
vs.
PROPELLER MOHAWK.

On application of the libellants, by their proctor, upon affidavit filed, leave is given them by the court to take the deposition of , before A. T. Galt, esq., at his office, at three o'clock this afternoon.

On this day, to wit, the eleventh day of July, in the July term, A. D. 1864, of said Circuit Court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

Appeal.

THE CHICAGO MARINE AND FIRE INSURance Company, David Douse, Ammi Douse, and John D. Muir,
vs.
THE PROPELLER MOAAWK.

Now come the parties, by their respective proctors, and thereupon this cause is set down for hearing upon the record and proofs filed herein, and after hearing the arguments of the respective proctors, the court not being sufficiently advised in the premises, takes time to consider.

On this day, to wit, the 10th day of July, in the July term, A. D. 1865, of said Circuit Court, in the record of the proceedings thereof in said entitled cause, is the following, to wit:

Appeal.

THE CHICAGO MANINE AND FIRE INSURance Company, David Douse, Ammi Douse, and John D. Muir,
vs.
THE PROPELLER MOHAWK.

The court having considered and being now fully advised upon the matters heretofore submitted herein, it is considered by the court that the decree of the District Court be affirmed, and the libels dismissed at the costs of the libellants, and that the respondent do have

and recover of and from the libellants and their stipulators the costs and charges by it about its defence in this behalf expended, and also its costs and charges in the court below, amounting to the sum of dollars and cents, and that it have execution therefor.

On the hearing of said cause in said Circuit Court, the libellants read in evidence the following testimony:

Deposition of John M. Sitts, taken at Chicago, Illinois, on the 21st day of June, A. D. 1864, before Azariah T. Galt, esq., notary public, on behalf of the libellants.

60 UNITED STATES OF AMERICA,
Northern District of Illinois:

Be it remembered, that on the twenty-first day of June, 1864, I, Azariah T. Galt, a notary public for the city of Chicago, in the said district, duly qualified, acting under and by virtue of a special appointment by the court to take the deposition, did come John M. Sitts, personally to appear before me at my office in the city of Chicago, in said district, to testify on the part of the libellant in a certain cause depending in the Circuit Court of the United States for the northern district of Illinois, at Chicago, wherein Joshua Barrell is libellant, and the propeller Mohawk is respondent; and the said John M. Sitts was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid. I carefully examined the said John M. Sitts, and he did thereupon depose and say as follows, to wit:

1st int. What is your name, age, occupation, and place of residence?

Ans. My name is John M. Sitts; my age forty-two; occupation is sailing. I live in Oswego, New York.

2d int. How long have you been a sailor, in what capacity, and where have you sailed?

Ans. I have sailed ever since I was sixteen years old; I am now forty-two; in all capacities from cook to master; I sailed between Oswego and Chicago, on all the lakes.

3d int. State how long you have been a master, and if you have been master of a propeller; and how long.

Ans. I have been master of different propellers for fourteen years; I sailed said vessels before.

4th int. Have you since that time been constantly passing on the St. Clair flats?

Ans. Yes, sir.

5th int. Do you know the propeller Mohawk?

Ans. Yes, sir; I have seen her several times.

6th. int. If you were passing through and down the channel on the St. Clair flats, about five or six hundred yards from Lake St. Clair, in the artificial channel, in the night time, with the propeller "Mohawk," heavily loaded, and found the channel about six hundred feet ahead of you obstructed by a vessel lying and heading diagonally to the northward and westward across the channel, and at anchor and

obstructing the channel, as to impede your passage, but thought you could get around her stern, and there was a doubt about your being successful, what would be your course?

Answer. My course would be to drop down slowly against her, and shove her away round out of the channel.

7th int. What is the condition of the channel at that point?

Ans. The current is not very heavy at that point; it spreads out into Lake St. Clair; it is the lake there.

8th int. Is there any way except grounding to avoid a vessel at anchor across the St. Clair flats?

Answer. Yes, sir; I have been there when vessels got around without grounding.

61 9th. int. Is there not danger of a collision, followed by damage to either vessel, by going down against the vessel situated as I have stated in question sixth? by going down slowly against her and pushing her out of the way?

Answer. That depends altogether on the captain; he may have a collision or not as he chooses.

Cross-examination.

By Mr. Bates:

1st int. What vessel do you sail now?

Ans. The propeller "Norman."

2d int. How long have you sailed propellers on the lakes?

Ans. I have been master of propellers on the lakes for fourteen years.

3rd int. What line of propellers?

Ans. The old Oswego line.

4th int. Where does the Oswego line of propellers run? Are they a competing line with the Western Transportation Company?

Ans. They run between Oswego and Chicago. I should not think they were a competing line.

5th int. How heavy is the current in the artificial channel in St. Clear six hundred yards or about a quarter of a mile above the lake?

Ans. I should not think there was much current there; it may be a mile, or two miles, I have backed up there, and laid there for vessels.

6th int. How came you to be subpœnaed here as a witness?

Ans. I don't know; don't know which side I am on. I was asked to come by McGill, and came.

7th int. Who have you talked with before you came here about this suit?

Ans. McGill is the only man I have talked with; he asked me if I would come to a certain office to give my testimony. I told him I would; did not know what they wanted.

8th int. Have you ever had any conversation touching the collision of the "Mohawk," when she burst her boiler, with McGill or any others?

Ans. Not as I know of; I heard of the collision at the time.

JOHN M. SITTS.

Deposition of Joseph L. Weatherby, taken at Buffalo, New York, on the 25th day of June, A. D. 1864, before Perry G. Parker, esq., U. S. commissioner, on behalf of libellants.

UNITED STATES OF AMERICA, *Northern district of New York, ss:*

Be it remembered, that on the 24th day of June, 1864, application was made to me, Perry G. Parker, a commissioner appointed by the Circuit Court of the United States in and for the northern district of New York, to take affidavit, acknowledgments of bail, &c., upon affidavit in behalf of Joshua Burrell, stating that the said Joshua Burrell was libellant in a suit then depending in the Circuit Court of the United States in the northern district of Illinois, on appeal, wherein the propeller Mohawk is defendant and The Western Trans-
62 portation Company is claimant and respondent; and that the testimony of Joseph L. Weatherby, of the city of Buffalo in the State of New York, was material and necessary for him, the said libellant, in the prosecution of the said suit, and that said Joseph L. Weatherby resided and lived at the city of Buffalo aforesaid, more than one hundred miles from the city of Chicago, in the State of Illinois, where the court at which the said libellant expected the said cause would be tried was appointed to be held.

That the president of the Western Transportation Company, John Allen, jr., resides at the said city of Buffalo, N. Y., and that John Hubbell, esq., the proctor or counsel for said claimant, respondent in said cause, resides at said city of Buffalo, and I was requested on behalf of said Joshua Barrel that the said Joseph L. Weatherby, might be examined according to the directions of the act of Congress in such case made and provided.

Whereupon I ordered that the said Joseph L. Weatheby should be examined de bene esse, before me, at the office of the Mutual Insurance Company of Buffalo, in the city of Buffalo, New York, on the 25th day of June, 1864, at eleven o'clock in the forenoon, and that notice of such examination should be given, on said 24th day of June, to John Hubbell, esq., by service on him personally, or his law partner, in the city of Buffalo, or by leaving the same at said Hubbell's office, and also on the president, secretary, or treasurer of the Western Transportation Company personally or by leaving the same at the office of said company, in said city of Buffalo, in order that said claimant should, if seen fit, be present at such examination and put interrogatories.

And I have satisfactory proof that such notice was given. And as well the said libellant, by George B. Hibbard, esq., his counsel, as the said claimant by its counsel, Wm. C. Fitch, esq., appearing before , at the time and place appointed, I have proceeded with the said examination.

Joseph L. Weatherby, being sworn according to law, testified as follows:

I reside in the city of Buffalo, in the State of New York. I am secretary of the Buffalo Mutual Insurance Company, and have been

since about the first day of May, 1863, and before the first day of June, 1863.

Witness is shown a letter dated June 27th, 1863, addressed to G. and T. Watson, Chicago, and says: That letter was written by me at the time it bears date, and written by me as secretary of said insurance company, and signed by me, and mailed the same day, I have no doubt, to Messrs. G. and T. Watson, at Chicago, Illinois. The letter is hereto annexed, Marked Exhibit A.

Witness says that on or about the 15th October, 1863, I received, as secretary, a letter from Robert Rae, of Chicago, Ill., dated October 13th, 1863, of which the paper here shown me is acopy. I have compared said paper with the original on file in my office this mording, and I find it is an exact copy. The origi-
63 ginal was read to me by one of the clerks in my office, and I at the same time looking over and reading the said copy, and I have no doubt the same is a correct copy of the whole of the letter. The original letter I decline to let go from the files of papers in my possession, as the secretary of said company. The copy of letter is hereto annexed, marked Exhibit "B."

On the 15th day of October, 1863, I wrote a letter, as secretary of said insurance Co., to Robert Rae, here shown me, and mailed the same to him at Chicago, the same day, in reply to his of the 13th of October, 1863, copy of which is hereto annexed, marked Exhibit B. The letter of October, 15th, 1863, is hereto annexed, marked Exhibit C, and returned as evidence.

Witness says that on the 17th day of June, 1863, there was a meeting of the executive committee of the Buffalo Insurance Company, at its office in Buffalo; I find on the records of said company the minutes of the proceedings of said committee.

The minutes produced here by me is the minutes of said proceedings, to wit:

"OFFICE OF THE MUTUAL INS. COMPANY OF BUFFALO,
"*June 17th*, 1863.

"By request of John Allen, jr., the following members of the executive committee assembled: S. S. Jewett, M. P. Bush, H. M. Kinne, and S. K. Worthington, at whose request John Ganson, esq., the attorney of the company, appeared and sanctioned the following telegraph:

"JOHN HUBBELL, Chicago:

"Appear for and do what you think necessary to protect the interests of the Mutual Insurance Company of Buffalo, in the case against the Mohawk, before Judge Drummond.

"H. M. KINNE.
"O. L. NIMBS.
"A. Y. BLACKMAN.
"CYRUS CLARK.
"JOHN G. DESHLER.
"M. P. BUSH.
"S. S. JEWETT."

"By agreement between the above-named members of the executive committee and John Allen, jr., the Western Transportation Company are to give to the Mutual Insurance Company of Buffalo, a bond to be drawn by John Ganson, indemnifying the company against any loss sustained, in consequence of above instructions to John Hubbell.

"J. L. WEATHERBY, *Secretary.*"

The above is a correct copy of the minutes of said proceedings, and of the whole thereof, and states correctly the proceedings of the committee had on that day. I do not know that the telegraph was sent to Hubbell. A copy of said despatch, as above entered
64 in the minutes, was given to Mr. John Allen, jr., by me at the time, to make such use of as he might think best. Mr. Allen was present during the whole time the committee was together and taking the action stated, and the proceedings were entered in the in the minutes by me, and, as there was no one else to give the despatch to, I have no doubt I gave it to Mr. Allen, and yet I cannot say now that I remember giving it to him by my own hand. Mr. John Allen, jr., was then acting as an officer of the Western Transportation Company. The dispatch given to Mr. Allen was signed by the parties as entered in the minutes in their proper handwriting, and the one in the book of minutes is also signed by them in their own handwriting; the two are duplicates. All the persons who signed the despatch were trustees of the Buffalo Mutual Insurance Company at the time. The executive committee of the said company have delegated to them full power to transact such business for the company. Mr. A. A. Eustaphieve was secretary of said Mutual Insurance Company before me. I was present at the meeting of the executive committee on the 17th of June, 1863, above given, as secretary. I did not act as a member of the committee to assent or dissent to its action. The committee appeared to understand the facts in the matter concerning which they acted. and to be familiar with the whole transaction. The bond to be given by the Western Transportation Company as mentioned in said proceedings was never given. I decline to let the original minutes of the proceedings of the said executsve committee go out of my possession, as secretary having their custody.

J. L. WEATHERBY.

Exhibits A, B and C, attached to the aforesaid deposition. are in the words and figures following, to wit:

Exhibit A.—P. G. Parker, U. S. C.

OFFICE OF THE MUTUAL INSURANCE COMPANY OF BUFFALO,
Buffalo, June, 27th, 1863.

Messrs. G. and T. WATSON, Chicago:

GENTS.: We with much pleasure and entire frankness answer your letter of 25th, received this a. m. There is no desire on the part of

the trustees of this company to "repudiate" the sale of the claim for loss by explosion on the propeller Mohawk, and no official action has been taken by them for such a purpose.

The writ was instituted, we are told, in the names of David Dows & Co., and The Chicago Fire and Marine Ins. Co., against the propeller Mohawk and owners, or the Western Trans. Co., we forget which. David Dows made affidavit that his firm had no interest in the claim. Subsequently our presid't, James C. Evans, was applied to for a sworn statement of his knowledge of the action of our trustees in making the sale, and as that testimony could be legally coerced from him, he, to save expense and trouble, furnished the statement voluntarily. On the 17th of this month, for the purpose, as we understood it, of enabling the counsel for the Mo-
65 hawk to force the knowledge of who are the real parties as plaintiffs, after long discussion at the board of trustees, and by sanction of John Ganson, (this company's counsel,) the following telegram was sent to the counsel of the Mohawk:

JOHN HUBBELL, Chicago:

Appear for and do what you think necessary to protect the interest of the Mutual Insurance Co. of Buffalo, in the cases against the Mohawk, before Drummond.

(Signed by seven trustees.)

This is all the company has done, and the above telegram was shown to the plaintiff's counsel, but was not, we are assured, produced as a document in court, the postponement of the case having been obtained on other grounds.

We do not know how many of the stockholders in the propeller line may at any time be "scrip"-holders of our company, because our "scrip" is a marketable commodity, and is continually changing hands; but we have a list, obtained to-day, (for the purpose of answering your letter,) of the "Directors in the Western Transportation Company," and we find that only one of them is a member of our board of trustees, and he did not sign the preceding telegram. This plain fact will, we trust, disabuse your mind of any impression that the "Buffalo Mutual" is in any way controlled by the persons or interests of the Western Trans. Company.

Trusting this frank explanation will be entirely satisfactory to you, and that you will see no good cause for dissatisfaction with the action of the president and the trustees,

I am yours, truly,

J. L. WEATHERBY, *Sec'y.*

Exhibit B.—P. G. Parker, U. S. C.

CHICAGO, *Oct. 13th*, 1863.

DEAR SIR: Yours of the 10th was duly received to-day. You evidently misunderstood me.

What I desired to know was, whether the Buffalo Mutual had any intention of disputing the validity of the assent made by them to Mr.

Barrel of their claim against the Mohawk. I only referred to what Mr. Bates said (Mr. Hubbel was at Buffalo) at the time the court rendered the decree in these cases in reference to your company, because the court seemed to be influenced by the suggestion that you so desired to contest the matter; and the court said, if you did, we ought to amend our pleadings so as to give you the opportunity. As it will give Mr. Barrel some trouble to do this, he does not desire to disturb the present condition of the case, unless to give you such an opportunity. It is therefore but fair that you should call your committee together, or, in any way satisfactory to yourself, obtain their intents, and let Mr. Barrel know what that intention is. Mr. Barrel instructs me to say that he would have no right to infer that you were in any way dissatisfied with your sale, if a telegram, signed by some of your trustees as such, had not been exhibited in court,
66 authorizing Mr. Hubbel to appear for Buffalo Mutual. An early reply will much oblige yours, truly,

R. RAE.

J. L. WEATHERBY, Esq.,
Sec. of Buffalo Mu. Ins., Buffalo.

Exhibit C.—P. G. Parker, U. S. C., June 25th, 1864.

OFFICE OF THE MUTUAL INSURANCE COMPANY OF BUFFALO,
Buffalo, Oct. 15th, 1863.

R. RAE, Esq., Chicago:

DEAR SIR: I have yours of the 13th, and decline calling our executive committee together, as we are assured by Mr. Hubbell that the telegram was never used, and would not be.

Yours, truly,

J. L. WEATHERBY, *Sec'y.*

The following depositions, taken Feb'y 26th and 27th, 1864, before George Gorham, a commissioner in the northern district of New York, on behalf of the respondents, were read in the hearing of said cause in the said Circuit Court of the United States for the northern district of Illinois:

And the said Robert A. Jones, being about the age of forty-one years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Robert A. Jones, and he did thereupon depose, testify, and say as follows, viz: I have been master of a propeller on the lakes (between Buffalo and Chicago most of the time) for nine years. I was a sailor on the lakes and ocean before that. I am well acquainted with the navigation of the St. Clair flats and the new channel. The old channel has not been used for four or five years. The new channel is an artificial one. The width of the new channel is about one hundred feet. I knew the propeller Mohawk in 1860, and do now. She is one of the largest class of propellers. I have known Capt. Pheatt for some 14 years. I have always heard him, understood him, and consider him

one of our first-class steamer captains. I have known Jeremiah Saunders for 14 years; have sailed in the same vessel with him; he was mate and I was before the mast. The map attached to Capt. Pheatt's testimony, gotten up by Jeremiah Saunders, and now shown me, is a very good one.

Question. If you were passing through the channel over St. Clair flats, in the night time, with the propeller Mohawk, heavily loaded, and found the channel completely obstructed by a vessel lying diagonally across the channel, what would have been your course as master, to have avoided the difficulty thus presented?

(Objection by Mr. Rae.)

Answer. The witness says he would like to know how the vessel was heading, and answers that if the vessel were heading to the northward and westward, I would attempt to get by her by going under her stern.

Q. Would it have been safe, under the circumstances to
67 have attempted to have run down against the vessel lying across the channel, with a view of moving her out of the way?

(Objected to as leading.)

Answer. It would not.

Question. Give a reason for that opinion.

Answer. There is a strong current running there, and the channel is very narrow, and there would be danger of sinking the vessel which lay across the channel.

Question. What difficulty would there have been in coming to an anchor on discovering this obstruction?

(Objection.)

Answer. There would have been danger of the propeller running on her own anchor.

Question. State whether there was any danger of the propeller getting on either bank by dropping an anchor?

(Objected to.)

Answer. Yes.

Question. Why could you not have gone around the head of the vessel?

(Objection.)

Answer. I would have been in danger of getting on the vessel's anchor, and also afoul of the vessel's bowsprit and jib-boom.

Question. When within about 600 feet of the obstructing vessel, what steps could you have taken to have stopped the propeller before coming in collision with the obstructing vessel?

(Objection.)

Answer. Not any that I know of, but to run her on the bank.

Cross-examination.

By libellant's counsel:

I have not talked over the matter with any one. I never heard of this matter—the suit—before to-day. Capt. Pheatt asked me to be up here at two e'clock to-day.

ROB'T A. JONES.

George Dickman sworn for the claimants:

I have been navigating the lakes for 18 years. I have been acquainted with the St. Clair flats for 18 years. I am acquainted with the new channel; it is an artificial channel. I do not think it is over fifty feet wide for the largest class vessels; that is, in the shallow part of it. I know the propeller Mohawk; she is one of the largest class of propellers.

Question. In passing through the channel with a propeller like the Mohawk heavily loaded, in the night time, what would be the consequence in attempting to suddenly stop the propeller?

(Objection.)

Answer. I think in ninety-nine cases out of a hundred she would get aground on one side or the other or the channel.

Question. Suppose a propeller like the Mohawk, under these circumstances, should discover a vessel lying across the channel and obstructing the passage, what would be the most prudent course for the propeller to take; the vessel's head being to the north and west?

68 (Objection.)

Answer. If I found I could not get under the vessel's stern without danger of collision, I should run her aground in preference to a collision.

Question. What would you do to get under the stern of the schooner or vessel? Or, in other words, would you make the effort to get under the vessel's stern?

(Objected.)

Answer. I would most assuredly go under the stern of the vessel, if possible, in preference to the bow.

Question. What would you think of running down against the vessel with a view of pushing her out of the way? State whether you would regard it good seamanship to do so.

(Objected.)

Answer. I do not think it would be prudent to do so in the night, from the fact that you can't tell the exact location of the vessel, or how fast you are moving.

Question. What consequences would you apprehend from such a movement against the vessel?

Answer. I should not only apprehend doing the vessel serious damage, but getting aground myself besides.

Question. Would you apprehend any danger to your own vessel aside from getting aground?

(Obj'd.)

Answer. Yes; there is liability of doing the propeller damage by staving bulwarks, or taking stem off, or something of that kind.

Question. What danger or consequence would there be in coming to anchor, or attempting to, under the circumstances?

(Obj'd to.)

Answer. In the first place it would be impossible to get an anchor out in time to do any good; and if you did, there would be danger of

the propeller running on her own anchor and staving a hole in her bottom, because propellers draw all the water there is in the channel.

Question. Is there any danger of getting on the banks from dropping an anchor, in addition to the other dangers?

(Objected to.)

Answer. At this place, where this vessel was, it would be impossible to come to anchor without getting aground one side or the other, with a loaded propeller, particularly head down stream.

Question. Have you ever had any experience in a matter of this sort?

(Objection. Question waived.)

GEORGE DICKSON.

William Dickson sworn for claimants:

I have been sailing for some ten years on the lakes, and for 15 years altogether; I am captain of the propeller Mayflower. I am acquainted with the St. Clair flats and with the propeller Mohawk.

Question. In passing through this channel with a propeller like the Mohawk, heavily loaded, in the night time, what would be the consequence in attempting to suddenly stop the propeller?

69 (Objection.)

Answer. The consequence would be that in stopping her you could not steer, because you would be drawing all the water there is there. There is a strong current, probably 2 or 3 miles an hour, and it would take considerable time to stop her headway. By backing the engine the wheel has a tendency to slew the stern, and send her head on the bank. You would get on one bank or the other.

Question. Suppose a propeller like the Mohawk, under these circumstances, should discover a vessel lying across the channel and obstructing the passage, what would be the most prudent course for the propeller to take—the vessel's head being to the north and west?

(Objection.)

Answer. The course I would take would be to try and get under her stern, because, the way she laid across the channel by stopping the propeller and backing you would certainly run the vessel down. The only safe course to pursue would be to go under her stern.

Question. What would you think of running down against the vessel with a view of pushing her out of the way? State whether you would regard it as good seamanship to do so.

(Obj'd.)

Answer. On a dark night you could not see the position the vessel was in till you got close on to her, so it would be impossible to stop the headway of the propeller without either striking the vessel or getting aground on the bank. That would depend on how much headway she had, or whether you could stop her or not. I would not run down against the vessel in the position she was in.

Question. Could you tell in the night time in that place how fast you were going?

(Obj'd.)

Answer. It would be very difficult without dropping a lead over the side.

Question. Then could you tell when there is a current?

Answer. You could not very near. We generally cross under a check.

Question. How much current is there?

Answer. I should think there was between a two and three knot current. It depends how the wind blows.

Question. What effect would it have on this vessel for a heavily loaded propeller gowing down with the current, even without machinery in motion, to strike her?

(Objec'd.)

Answer. If she was an old vessel the tendency would be to sink her.

Question. Would it have a tendency to injure the vessel, or propeller, or both?

(Obj'd.)

Answer. It certainly would have a tendency to injure the vessel. If the propeller struck her a slanting blow, it would certainly injure the propeller too.

WM. DICKSON.

70 FEBRUARY 27TH, 1864.

A. A. Eustaphieve sworn for claimants:

I was secretary of the Mutual Insurance Company for some 16 years prior to the first of April, 1863. I remember the matter of the Mohawk in the fall of 1860. The B. M. Ins. Co. had a risk upon the cargo of the Mohawk, under a certificate of insurance. No. 742, issued by Atwater of Chicago, for $9,690, in favor of T. J. Bronson, on 10,200 bushels of wheat, cargo of propeller Mohawk; and also by certificate No. 738, issued by Atwater in favor of Isaac Sherwood for $10,000 on 10,000 bushels of wheat, cargo of propeller Mohawk, the originals of which are in the possession of the counsel for libellants, and are to be produced upon the trial, and are now surrendered and are attached hereto, marked 1 and 2. I know the losses were paid to James D. Sawyer. Sawyer assumed to represent D. and A. Dows &. Co. We paid these losses to the person holding the certificates. I think Sawyer made the abandonment upon behalf of D. and A. Dows & Co.' I paid the claims to the party holding the certificates. My impression is that Dows & Co had both certificates. Out of that loss there grew a controversy between the Buffalo Mutual Ins. Co. and the Western Tr. Co. in respect to 1,100 bushels of wheat. There was no claim made by the Insurance Co. against the W. T. Co. growing out of this affair, other than in respect to the 1,100 bushels. A suit was commenced by the B. M. Ins. Co. ag't the W. T. Co. in the superior court of Buffalo, having reference to this 1,100 bushels of wheat. John Ganson was the attorney in the case.

Ganson and myself had no consultation with regard to an agreed statement of facts.

Question. Did you and Ganson consult with regard to the circumstances of the case which was brought before the bringing of the suit?

Answer. I talked with Mr. Ganson a day or two before I told him to sue the company.

Question. Did you and Mr. Ganson never have but one talk upon this matter?

Answer. I do not recollect whether I had one talk or more about the case. I did not consider the case of importance enough to talk much with Ganson about it. He was attorney for the company, and we talked generally. We had the usual interviews which are had between attorney and client. Mr. Ganson informed me that the case went to judgment. He never informed me that it was a pro forma judgment. I learned from Mr. Ganson that there had been a trial of this cause between the insurance company and the W. T. Co. I was not present at the trial; I cannot say that Mr. Ganson told me that the facts of the case were agreed upon between the counsel for the insurance co. and the W. T. Co. I did not know that the case was tried upon stipulation. I do not know that there were any witnesses called in the case. I do not remember ever reading over with Ganson a stipulation which was to be agreed upon by Ganson and Mr. Hnbbell of the facts in the case. I do not remember when the cause was tried. I have no recollection of a suggestion
71 from Ganson that I should agree to a stipulation of the facts.

I know John Ganson's signature. This is his signature to this stipulation, and this is Mr. Hubbell's signature.

(Stipulation is offered in evidence, and is attached hereto, as also complaint and answer in same case. Mr. Rae objects.)

My opinion is that before any assignment of claim was made, Ganson was ordered to withdraw the suit by me. This was from 3 to 7 days before the assignment. This was after I had been informed by Ganson that there had been a trial of the case. I do not know Joshua Barrell. I had no direct correspondence with him in regard to this matter. I inserted the name of Joshua Barrell in the assignment by direction of Sam'l T. Atwater, of Chicago. Mr. Atwater negotiated with me for the assignments. I do not remember whether Atwater proposed to buy them, or to buy for some one else,

The negotiation was done in part by letter, and the final arrangement, I think, was made personally. It was about the time the assignment was dated. Money was handed to me by Atwater. It was paid in cash, by a draft. It was not charged in account. The money paid was some 2,300 or 2,400 dollars. Mr. Atwater was the agent of the B. M. Ins. Co. at Chicago. There had been a correspondence between Atwater and myself in reference to the bringing of a suit upon the whole claim against the W. T. Co. I seems to me we had talked the matter over, but I cannot be certain. I think I told Mr. Atwater that as far the ins. co. was concerned, they would not sue. I do not now refer to the 1,100 bushels.

Question. Was anything said or written by Mr. Atwater by which you understood that he wished to get the claim into his own hands for the purpose of suing the W. T. Co., or anything to that effect, or on that subject?

(Objection.)

Answer. I did not understand that he wanted to get the claim into his own hands; but he never expressed but one opinion, and that was that the company was liable, and ought to be sued.

Q. When he bargained for the assignment of these certificates, did you understand that it was with a view of bringing a suit against the W. T. Co., or what did Mr. Atwater say?

(Objection.)

Answer. I don't think, at the time he sent the money, that he said anything. The money was sent by Atwater from Chicago. I do not remember his saying he or any one else was going to sue any one at the time of the negotiation. Mr. Atwater did not say at the time that he was going to sue, or any one was. We talked this thing over whenever we met. He often told me that he considered the W. T. Co. liable, and that they ought to be sued. These were generalities. I think we had but one personal interview, and this was referred to then. I informed Mr. Atwater that I had been informed by one counsel in Buffalo that the ins. co. had no claim against the W. T. Co., (except the 1,100 bus.)

Ques. Did you sign the assignment of those certificates in
72 pursuance of any resolution of the board of trustees or directors of your company?

(Obj'd.)

Answer. I had no authority of the whole board of trustees. There was no board assembled. I explain this answer in this way.

(This explanation is objected to by Mr. Hubbell as no explanation.)

I was authorized by a majority of the executive committee to make the sale and transfer. We had a board of 24 directors. The subject of these assignmeuts was never brought before this board of directors, or the majority of them, at any regular meeting. The executive committee consisted of five members of the board, and president and secretary. The president and sec'y were members of the board of trustees. I think the executive committee was never assembled as a committee, and the subject of these assignments brought before them. I know they were not. I drew up this paper, marked Exhibit 6, and procured the signatures to it. Mr. Hazard signed it in his office. They all signed it separately in their several places of business. There was no consultation when I was present. The other members of the executive committee were James C. Evans, pres't of the co., Jason Parker, and Dean Richmond. I think nothing was said to these gentlemen in reference assigning these claims. This resolution was simply pasted in the minute book. This money received from Atwater was credited to profit and loss, or else to marine loss.

All right, title, interest, and everything was [was] assigned connected with the loss. Other assignments were made at the same

time connected with this. I think the board never got together but twice a year, June and Febr'y. Can't remember how soon after the assignment that I heard suit was commenced.

Cross-examination.

Our agent at Detroit, at the time of the loss, was John W. Strong. The abandonment was made at the office here.

Question. What instruction, if any, did you give Strong in reference to the cargo after you accepted the abandonment?

(Objected to on ground as incompetent.)

Answer. I instructed him to sell the damaged portion of it to the best advantage he could, just as it lay in the St. Clair flats. The instructions were all given by letter or by telegram.

Question. Did you give him any further instructions?

(Objection.)

Answer. I afterwards instructed him to let it alone and not meddle with it unless the parties waived all claim to freight. I afterwards received the promissory note of one Phelps for a part of cargo sold at Detroit. I received it from the agent of the company at Detroit by letter. The note was sent to Detroit for collection, and was protested and sent back here. I enclosed it to the W. T. Co.

(Objection.)

After I received the note I had an interview with Mr.
73 Bryant and Capt. Pheatt at my office. It was a few days after I received it. Mr. Bryant and Capt. Pheatt came into the office to talk over this matter of the wheat with me. They stated that the wheat was sold for account of the vessel at Detroit; that the note of $1,200 given for the proceeds of that wheat belonged to the owners of the boat, W. T. Co. I said to them that I had sent the note to Detroit for collection, and I should hold the note as a trustee for the W. T. Co.; that I did not want anything which did not belong to me. When the note was protested it was returned by Mr. Strong. As soon as I received it back I addressed a letter to John Allen, jr., the president of the W. T. Co. This is the letter hereto annexed, marked No. 7, and is produced by the W. T. Co. I received an answer from Mr. Allen, the president of the co., with the note enclosed, saying he did not want any of my protested notes. He returned the note, disclaiming any title to it. (A copy of this letter is to be annexed hereto, with the same effect as if here produced, No. 8.)

(The reply of Mr. Eustaphieve is here produced, marked Exhibit No. 9. Objection.)

Our company was sued by the Chicago Fire and Marine Insurance Co. for this loss. During the pendency of this suit I think there may have been correspondence with Mr. Atwater in reference to bringing suit against the pr. Mohawk and the W. T. Co. I think in the course of the correspondence with Mr. Atwater, before the negotiation of the assignment, that he sent me a list of authorities in reference to suing the W. T. Co. and the propeller. He furnished me with the case of the bark Edwin, 24th Howard. I think he did

not refer me to an act of Congress. I think I took this list of authorities to Mr. Smith, the law partner of the insurance co.'s counsel, and he said they were inapplicable. It may be I took it to Ganson. Mr. Atwater, from the first to the last, contended that the W. T. Co. was liable, and gave his reasons for it. Before the assignment I submitted the case to our counsel as to the liability of the W. T. Co., and he was of the opinion that we could not recover. He stated that the insurance company, if they sued the W. T. Co., would have to prove negligence on the part of the W. T. Co. That the onus was upon us, and we could not probably prove it.

Question. State the manner in which you have been accustomed to assign the salvage and other claims of the company for the 16 years you were secretary of the company.

(Obj'd.)

Answer. I always had been in the habit of settling up in my own way. Never asked anybody. I had been in the habit of getting the signatures of the executive committee to resolutions separately at their places of business, without their being called together, and pasting them in the book.

(Under objection.)

Question. State whether the members of the ex. com., who signed this resolution authorizing the assignment of these claims, knew the contents of the resolution and the circumstances in reference
74 to the loss on the pr. Mohawk, and the opinion of the counsel on the subject.

(Objec'd.)

Answer. Yes, sir, they did. They knew of it and all of them knew it.

Q. Did the ex. com. know of the reception of the money?

Answer. I can't tell; or whether the trustees did. The security company advised me they were willing to abide by our sale, and instructed me to make the sale for them. I paid the money over to their agent here.

Question. Did Mr. Atwater represent that he bought the claims for himself or for Joshua Barrell?

(Objection.)

Answer. He represented he was acting for Joshua Barrell. I mean this at the time of the assignment. He always represented he was acting as agent. I never heard of Jeremiah Saunders or any of the facts he stated in his deposition till November last, (1863.) I knew nothing of the circumstances of this explosion and stranding when I ordered the discontinuance of the suit on the 1,100 bushels. I had seen the vessel's protest before paying the loss, and that was all I did know. The insurance co., or the security co., or myself, reserved no rights whatever under the assignments, and do not expect any profits or emolument under the lawsuit.

Re-direct.

Henry C. Walker represented the security co. here. He is the general agent, and everything was done with him. I don't think I

ever heard of Joshua Barrell in connexion with this transaction, till his name was inserted in the assignment. The papers came to me from Chicago, filled up with Barrell's name, and this was the first I ever heard of him in this connection. This is the first claim I ever sold as sec'y. This was the reason why I consulted to ex. com. The first intimation I had that the W. T. Co. claimed exclusive right to the note was when Bryant and Pheatt came to the office as I have stated. Pheatt was captain of the Mohawk. Bryant said he was sent by the W. T. Co. He was a large stockholder, and one of the directors of the co.

A. A. EUSTAPHIEVE.

Exhibit 1, *Geo. Gorham, U. S. Com'r.—Certificate of insurance.*

The Mutual Insurance Company of Buffalo, N. Y., S. T. Atwater, agent, office No. 2 Dole's building, corner South Water and Clark streets.

$10,000. No. 738.

CHICAGO, *October* 31*st*, 1860.

This certifies that Isaac Sherwood, esq., is insured under and subject to the conditions of policy No. 100, issued by the Mutual Insurance Company of Buffalo, in the sum of ten thousand dollars, on 10,000 bushels wheat, in-board cargo of the prop. Mohawk,
75 at and from Chicago to Buffalo, at the rate of 2.48 per cent., which premium of $248 is hereby acknowledged to have been received.

Loss (if any) payable to J. Y. Scammon, esq., p't, order hereon, and return of this certificate.

This certificate of insurance is not valid until countersigned by Samuel T. Atwater, agent of this company at Chicago.

A. A. EUSTAPHIEVE, *Secretary.*

Countersigned at Chicago, this 31st day of Oct., 1860.

SAM. T. ATWATER, *Agent.*

Indorsed: H. G. Loomis, a's v. pres.; J. Young Scammon, p't.

Rec'd from Mut. Ins. Co., of Buffalo eight thousand and two hundred dollars on ac., ($8,200.)

Nov. 14, '60.

JAMES D. SAWYER.

Rec'd from Mutual Insurance Co. of Buffalo three hundred dollars ($300) on ac.

Nov. 27th, 1860.

JAMES D. SAWYER.

Rec'd from Mutual Insurance Co. of Buffalo, three hundred sixty-two and 65-100 dollars ($362 65) on ac.

Dec. 19, 1860.

JAMES D. SAWYER.

Rec'd from Mutual Insurance Co. of Buffalo six hundred nineteen and 37-100 dollars ($619 37) on ac.
Dec. 22, 1860.

JAMES D. SAWYER.

For and in consideration of one dollar, the Mutual Insurance Co. of Buffalo does hereby assign to Joshua Barrell all their right, title, and interest in the within certificate of insurance, with all choses in action accruing to it or for its benefit by reason of said policy.
Dated Buffalo, July 1st, 1862.

A. A. EUSTAPHIEVE,
Sec'y Mut. Ins. Co. of B.

Exhibit 2, *Geo. Gorham, U. S. Com'r.—Certificate of Insurance.*

The Mutual Insurance Company of Buffalo, N. Y., S. T. Atwater, agent, office No. 2 Dole's building, corner South Water and Clark streets.

$9,690. No. 742

CHICAGO, *October* 31*st*, 1860.

This certifies that T. J. Bronson, esq., is insured under and subject to the conditions of policy No. 100 issued by the Mutual
76 Insurance Company of Buffalo, in the sum of ninety-six hundred and ninety dollars, on 10,200 bushels wheat, in-board cargo of the prop. Mohawk, at and from Chicago to Buffalo, at the rate of 2.48 per cent., which premium of $240 31 is hereby acknowledged to have been received.

Loss (if any) payable to Mes. D. & A. Dows & Co.'s order hereon, and return of this certificate.

This certificate of insurance is not valid until countersigned by Samuel T. Atwater, agent for this company at Chicago.

A. A. EUSTAPHIEVE, *Secretary*.

Countersigned at Chicago this 31st day of Oct., 1860.

SAM'L T. ATWATER, *Agent*.

Indorsed: Pay within to J. D. Sawyer or order. D. & A. Dows & Co. T. J. Bronson.

Rec'd on this certificate seven thousand eight hundred dollars on ac. of this loss, (7,800.)
Nov. 14, '60.

JAMES D. SAWYER.

Rec'd on this certificate three hundred fifty-seven and 33-100 dollars ($357 33) on ac. this loss.
Nov. 27, 1860.

JAMES D. SAWYER.

Rec'd on this certificate three hundred seventy and 55-100 (370 55) on ac. this loss.
Dec. 19, 1860.

JAMES D. SAWYER.

Rec'd on the within certificate five hundred eighty and 63-100 ($580 63.)
Dec. 22d, 1860.

JAMES D. SAWYER.

For and in consideration of one dollar, the Mutual Insurance Company of Buffalo does hereby assign to Joshua Barrel all their right, title, and interest in the within certificate of insurance, with all choses in action accruing to it or for its benefit by reason of said policy.
Dated Buffalo, July 1st, 1862.

A. A. EUSTAPHIEVE,
Sec'y M. Ins. Co. of B.

Exhibit 6—Geo. Gorham, U. S. Com'r.

Superior Court of Buffalo.

THE MUTUAL INSURANCE COMPANY OF BUFFALO
against
THE WESTERN TRANSPORTATION COMPANY.

The following facts are to be admitted on the trial of this action for the purposes of such trial:

77 First. That the plaintiff and defendant are corporations created and organized as such under the laws of the State of New York, and do business in the city on Buffalo, and were such corporations doing business as aforesaid, at the various times mentioned in the pleadings in this action. The plaintiff, as an insurance company doing business upon the lakes, and insuring against dangers of navigation and taking marine risks of all descriptions, and the defendant being a common carrier for hire between the city of Chicago and the city of Buffalo, by way of the lakes, by means of steamboats, sail vessels and other craft, and that among the steamboats so owned and used by the defendant in its said business was the propeller Mohawk, which, at the times mentioned in the complaint, was actually engaged in the transportation of goods, property, and merchandise between Chicago and Buffalo aforesaid on account of the defendant; that in the month of October, 1860, the said propeller Mohawk was at the port and city of Chicago, and about to commence a trip or voyage by way of the lakes from Chicago to Buffalo, and to take and carry such goods property, or merchandise, as might be offered for transportation, at such rates as might be agreed upon between the owner or owners of property so shipped and the master of the propeller or the agent of the defendant; that one N. F. Fairbanks then and there

shipped on board the said propeller two quantities or parcels of wheat amounting to twenty thousand two hundred and seventeen bushels, to be carried and transported from Chicago to Buffalo, under the agreement contained in two bills of lading hereto annexed, and which are to be taken as a part of this stipulation; that the said propeller, being in good and seaworthy condition, left the port and city of Chicago in the performance of the before-mentioned trip, and after the same had been more than half completed and performed in good safety, and while so engaged in the prosecution of the said trip or voyage, the said propeller, by the dangers of navigation, grounded upon St. Clair flats, and in the effort to get off, the said propeller became disabled by the bursting of her boiler, and was thereby compelled to suspend the further prosecution of the said voyage until the said propeller could be got off, and the necessary repairs could be made. This disaster occurred 30 miles from Detroit, in the State of Michigan, on the 7th day of November, 1860, and by it, all the wheat, except that mentioned in the complaint, was damaged the sinking of the propeller. The accident happened without fault on the part of the propeller, her officers or crew; that upon information of the said disaster reaching Buffalo, the agent of the owner of the said wheat immediately abandoned the same to the plaintiff in this action, the plaintiff having insured the same against loss or damage on the said trip or voyage by reason of the dangers or risks of navigation; the plaintiff accepted the abandonment so made, and paid the loss to the owner of the wheat; that soon after this accident, the defendant removed from the propeller the wheat in the complaint mentioned, in good order, and shipped the same for Buffalo, which reached there on the 16th of November, 1860, and the
78 agent of the plaintiff sold the balance on the wheat on board the propeller where she then lay, and as it then was, to one F. E. Phelps for 1,200, on a credit of 30 days, taking his note for the amount, with an indorser satisfactory to said agent. The note was thereupon executed by Phelps and indorsed as agreed, and delivered to the plaintiff, who then came with Mr. Phelps to the master of the propeller in Detroit, and informed him of the sale; the master, at the request of such agent, then gave Phelps a written order on the officer of the propeller to deliver the wheat to Mr. Phelps; and thereupon the said Phelps proceeded to the propeller and demanded the wheat from the officers thereof under his said purchase from the plaintiff, and Phelps then commenced taking the wheat from the propeller; that the next day, the agent of the plaintiff, at Detroit, called upon the master of the propeller, and stated to him that he had instructions from the home office, which was the fact, to annul the sale to Phelps, and said he intended to do so, on the ground that the plaintiff had heard or been advised that the defendant intended to claim and insist that it was entitled to freight upon the said wheat, notwithstanding the accident. The master of the propeller having charge, then said the sale was a good one for all parties, and advised the said agent of the plaintiff not to interfere with what had been done, but to let the sale stand as having been made on account of whom it might concern. The plain-

tiff's agent assented to this, and took no other steps in reference to the wheat on the propeller, and Phelps continued to take from the propeller 8,000 bushels of the wheat; and the balance of all the wheat mentioned in the bills of lading, except the eleven hundred and odd bushels mentioned in the pleadings, which had been sent forward to Buffalo by the defendant in another vessel, remained in the propeller till it was got off and towed to Detroit, when such balance was delivered to Mr. Phelps, being eleven thousand and ninety bushels. Mr. Phelps reshipped from Detroit to Buffalo, on the 20th of November, 1860, 3,500 bushels of said wheat, which was sent on board of said propeller for Buffalo, at a freight of five cents per bushel, which was transported from Detroit to Buffalo on said propeller, which was towed to Buffalo, and the said freight was there paid by the said Phelps to the defendant. The note given by Phelps to the plaintiff was retained by the plaintiff and is now in the possession of the plaintiff. The propeller Mohawk was got off after a few days, and subsequently was towed to Buffalo in a disabled condition before the close of navigation for that year, which closed about the middle of December. The place of the disaster was at St. Clair flats, about 30 miles from Detroit, directly in the track of vessels engaged in the lake trade between Buffalo and Chicago. No part of the freight on the wheat has ever been paid or tendered by the shipper or owners thereof, or by the plaintiff, or any other person or persons, except as hereinafter mentioned. At the time the same was delivered to and taken by Phelps no offer to pay the freight or any portion of it was made by him or by any other person or persons. The wheat mentioned in the pleadings was not delivered to Phelps, but was brought to Buffalo, and the plaintiff claimed to own the same and to be entitled to is possession under and by
79 virtue of the abandonment hereinbefore mentioned. The defendant claimed and insisted that it was entitled to freight upon the entire shipment, including as well that which was delivered to Phelps at St. Clair flats and Detroit as that which had been brought to Buffalo, being the wheat mentioned in the complaint, and declined to deliver the same to the plaintiff until the freight on the entire shipment was paid or adjusted. The plaintiff thereupon tendered to the defendant an amount equal to fifteen cents per bushel upon the wheat so brought to Buffalo mentioned in the complaint, and a sum in addition to cover the general average charges, and demanded the delivery of the wheat to it, which was refused by the defendant, and thereupon this action was commenced. The wheat mentioned in the complaint was worth 95 cts. per bushel. If the defendant is only entitled to pro rata freight, the sum is stipulated at 7½ cents per bushel on the 20,000 bushels, and, if to full freight, at 15 cents per bushel on the 20,000 bushels.

CHICAGO, *Oct.* 31, 1860.

Shipped in good order and condition by N. K. Fairbank, as agent and forwarder, for account and at the risk of whom it may concern, on board the prop'l Mohawk, wherof Pheatt is master, the follow-

ing articles as here marked and described, to be delivered in like good order and condition as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, the dangers of navigation, fire, and collision excepted.

In witness whereof, the said master of said vessel hath affirmed to bills of lading, of this tenor and date, one of which being accomplished, the other to stand void.

Ac't and property of David Dows & Co., New York, care J. D. Sawyer, Buffalo. 10,217 45 bush. No. 1 spring wheat; freight to Buffalo, 15c.

(Signed) JON. W. TUTTLE, *Agent.*

CHICAGO, *Oct.* 31, 1860.

Shipped in good order and condition by N. K. Fairbank, as agent and forwarder, for account and at the risk of whom it may concern, on board the prop'l Mohawk, whereof Pheatt is master, the following articles as here marked and described, to be delivered in like good order and condition as addressed on the margin, or to his or their assigns or consignees, upon paying the freight and charges as noted below, the dangers of navigation excepted.

In witness whereof, the master of said vessel hath affirmed to bills of lading, of this tenor and date, one of which being accomplished, the other to stand void.

Ac't Chicago Fire and Marine Ins'e Co., care J. D. Sawyer, Buffalo. 10,000 bush. No. 1 spring wheat; freight to Buffalo, 15c.

(Signed) JON. W. TUTTLE, *Ag't.*

JOHN HUBBELL, *Defendant's Att'y.*
JOHN GANSON, *Pl'ff's Att'y.*

80 Superior Court of Buffalo.

Exhibit 4.—*Geo. Gorham, U. S. Comm'r.—Summons.—Relief.—Complaint served.*

THE MUTUAL INSURANCE COMPANY OF BUFFALO, plaintiff,
against
THE WESTERN TRANSPORTATION COMPANY, defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, of which a copy is herewith served upon you, and serve a copy of your answer on me, at my office in the city of Buffalo, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded in the said complaint.

Dated Buffalo, December 13th, 1861.

JOHN GANSON,
Plaintiff's Attorney, Buffalo.

Superior Court of Buffalo.

THE MUTUAL INSURANCE COMPANY OF BUFFALO
against
THE WESTERN TRANSPORTATION COMPANY.

The Mutual Insurance Company of Buffalo, by John Ganson, its attorney, complains of the Western Transportation Company, defendant in this action, according to the form of the statute in such case made and provided, for that heretofore, and on or about the first day of December, one thousand eight hundred and sixty, the said defendant, which is a body corporate and politic, created, existing, and doing business as such under and by virtue of an act of the people of the State of New York represented in senate and assembly, entitled "An act for the incorporation of companies formed to navigate the lakes and rivers," passed on the fifteenth day of April, one thousand eight hundred and fifty-four, and of the acts amendatory thereof and supplementary thereto, converted to its own use eleven hundred and fifty-seven bushels and twenty-two pounds of wheat, the property of the plaintiff, being a part of the cargo of the propeller Mohawk, of the value of fifteen hundred dollars.

The plaintiff in fact further says, that it is a body corporate and politic, created, existing, and doing business as such under and by virtue of an act of the people of the State New York in senate and assembly represented, entitled "An act to incorporate the Mutual Insurance Company of Buffalo," passed on the eighteenth day of April, one thousand eight hundred and forty-three, and of the acts amendatory thereof and supplementary thereto.

81 Wherefore the plaintiff demands a judgment against the defendant for the sum of fifteen hundred dollars and the costs of this action.

JOHN GANSON,
Plaintiff's Attorney.

STATE OF NEW YORK, *Erie County, ss:*

Alexander A. Eustaphieve, being duly sworn, deposes and says that he is the secretary of the Mutual Insurance Company of Buffalo, the plaintiff in the preceding complaint named; that he has read the said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, he believes it to be true.

A. A. EUSTAPHIEVE.

Subscribed and sworn to before me this 13th day of December, A D. 1861, at the city of Buffalo.

THOS. BATH,
Com'r of Deeds for the city of Buffalo.

Superior Court of Buffalo.

Exhibit 5.—Geo. Gorham, U. S. Com'r.

THE MUTUAL INSURANCE COMPANY, OF BUFFALO,
against
THE WESTERN TRANSPORTATION COMPANY, OF Buffalo.

The Western Transportation Company, the defendant in this action, by John Hubbell, its attorney, comes and defends the same, and for answer to the complaint therein, the defendant denies each and every allegation in the said complaint contained, in manner and form as the same are therein stated and set forth, except the allegations therein as to the incorporation of the said defendants, which is admitted to be true as stated in the said complaint.

Second. And for a further answer to the said complaint, the defendant says that in the month of October, one thousand eight hundred and sixty, it then was, and ever since has been, and still is, a common carrier for hire upon the lakes between the city of Chicago and the city of Buffalo, and was and is the owner of steam and sail vessels which then were, and still are, used and employed by the said defendant in the business aforesaid, and that the propeller Mohawk mentioned in the complaint was used and employed by the defendant in the said business, and was, on or about the thirty-first day of October, in the year aforesaid, at the said city of Chicago, and about to commence a trip or voyage from Chicago to Buffalo, by way of the lakes, and to take or carry on such trip or voyage such goods, property, and merchandise as might be offered for transportation for hire, and at such rates of freight as might be agreed upon. And that, on or about the day aforesaid, certain persons at Chicago aforesaid, shipped on board the said propeller a certain parcel or quan-
82 tity of wheat, consisting of twenty thousand two hundred and seventeen bushels and forty-five pounds of wheat, under an agreement that the same should be transported by way of the lakes, from Chicago to Buffalo, and that the said defendant should have and receive as freight for such carriage and transportation fifteen cents per bushel, upon the delivery of the same at Buffalo aforesaid to the consignees named in the bills of lading then and there executed by the master of the said propeller and the shipper of the said wheat; that one portion of the said wheat, consisting of ten thousand two hundred and seventeen bushels and forty-five pounds, was upon the said bills of lading consigned to the account of D. and A. Dows & Co., New York, to the care of J. D. Sawyer, at Buffalo, aforesaid, the freight upon which amounted to fifteen hundred thirty-two dollars and sixty-seven cents; and the other portion of the said wheat was consigned to the account of the Chicago Fire and Marine Insurance Company, to the care of J. D. Sawyer, at Buffalo aforesaid, the freight of which amounted to fifteen hundred dollars; and the said defendant in fact further says, that the said propeller having received on board thereof the said parcel or quantity of wheat,

under the said agreement, and bills of lading having been duly executed therefor, left the port of Chicago aforesaid for Buffalo aforesaid, by way of the lakes, and while engaged in the performance of the said trip or voyage, and while she was engaged in the process of earning the freight upon the said wheat was, by mere accident and without fault on the part of the said defendant, or of the officers or crew of the said propeller, temporarily disabled and compelled to suspend for a time the prosecution of the said voyage, until the necessary repairs could be made, which said accident and misfortune happened when the said trip or voyage had been about half completed and performed. And the said defendant further says, that the owners and consignees of the said wheat, immediately upon the occurrence of the said accident, made an abandonment thereof to the said plaintiff, who had made certain insurances upon the said wheat, the precise nature of which is unknown to the said defendant; and the said defendant further says, that the abandonment was thereupon accepted by the said plaintiff, and the said plaintiff, under and by virtue of said abandonment, thereupon claimed to be the owner of the said wheat, and of every portion thereof, and did then and there assume the control and disposition of the same; and the said plaintiff did then and there sell and dispose of a portion thereof, and did demand and require the said defendant to deliver the said wheat to the said plaintiff, and to persons claiming through and under the said plaintiff, at the place where said accident happened, and while the said propeller was then and there detained; and thereupon the said defendant, in pursuance of such demand and request of the said plaintiff, did deliver the greater portion of said wheat to the said plaintiff, and to the persons claiming under them, at the place where such accident happened as aforesaid; and that the said plaintiff did not nor would pay to the said defendant the freight so agreed to be paid, nor any part nor portion thereof, but took and
83 converted the said wheat to its own use, and have hitherto wholly refused to pay the freight or any part or portion thereof, or any sum whatever by way of compensation for such carriage and transportation; and the said defendant in fact further says that, at the same the said wheat was so taken and demanded by the plaintiff, and delivered by the said defendant, the said defendant was ready and willing to carry out and fulfil the said contract for the transportation of the said wheat, and to deliver the same at Buffalo aforesaid, according to the said bills of lading, within a reasonable time, of which the plaintiff had notice; and that it was prevented from so performing the said contract by reason of the actings and doings hereinbefore mentioned. That the said defendant was the owner of other steam and sail vessels, upon which the said wheat could have been transhipped and brought to Buffalo in case the accident should prove of so serious a nature as to occasion great delay in the performance of said contract; and the said defendant further says, that there was delivered to the said plaintiff, and to the persons so claiming under it, all of said cargo, except the wheat mentioned in the complaint, and for the wheat so taken and delivered

the defendant claims and insists that it is entitled to have and receive from the said plaintiff the freight and compensation justly due for the carriage and transportation of the said wheat, by reason of the matters and things hereinfore mentioned and set forth.

Third. And, for a further answer to the said complaint, the defendant says that the wheat mentioned and set forth in the complaint was and is part and parcel of the shipments and cargo of wheat mentioned in the foregoing second answer, and none other or different. That the said plaintiff has hitherto wholly refused to pay the freight and compensation justly due to the defendant for the carriage and transportation of the said cargo and shipments of wheat in the foregoing answer mentioned; and that the said defendant has detained the said wheat mentioned in the complaint, and do still detain the same as security and for the purpose of enforcing its lien thereon for the transportation and carriage therein before mentioned; and the said defendant in fact, further says, that the wheat mentioned in the complaint is of less value than the amount and sum jointly due for the carriage and transportation aforesaid; wherefore the defendant demands judgment against the said plaintiff for the sum justly due to it for the carriage and transportation of the said property, together with the costs of this action.

JOHN HUBBELL,
Defendant's Attorney.

ERIE COUNTY, *City of Buffalo.*

Bard. A. Root, of the city of Buffalo, being duly sworn, says that he is the secretary of the defendant, and is acquainted with the facts of this case, that the foregoing answer true of his own knowledge, except as to the matters which are therein stated on the information and belief of this deponent, and as to those matters, he believes it to be true.

B. A. ROOT.

84 Sworn to before me this 15th day of April, 1862.
WM. C. FITCH, *Com. of Deeds.*

Exhibit 6.—*Geo. Gorham, U. S. Com'r.*

OFFICE OF MUT. INS. CO. OF BUFFALO,
June 28, '62.

In committee:

Resolved, That the secretary be hereby authorized to sell any and all claims this company may have *vs.* The Pro. Mohawk, for and in consequence of the sinking and damaging a cargo of wheat on board of said vessel on St. Clair flats in the fall of 1860, reserving the claim now in suit to the said wheat delivered at Buffalo.

The condition and consideration of the above sale to be one thousand dollars, to be paid to this company by said purchaser.

E. S. HAZARD.
S. K. WORTHINGTON.
A. A. EUSTAPHIEVE.
M. P. BUSH,
Executive Committee.

Exhibit No. 7.—Geo. Gorman, U. S. Com'r.

OFFICE THE MUT. INS. CO. OF BUFFALO,
Dec. 20, '60.

JOHN ALLEN, jr., esq., pr. W. T. Co.:

Some days since Mr. G. H. Bryant, connected with your company, informed me that the grain on Mohawk "was sold for account of W. T. Co." I informed him, if so, that I did not propose to keep it, the note, only in trust. Capt. Pheatt confirms Mr. Bryant's statement that "cargo was sold for ac't Mohawk." I therefore enclose herewith the note of Mr. Phelps, 1,200, and pro. $\frac{75}{100}$ as claimed by your company.

Mr. Strong assures me the note is good, and maker can give security, but cannot realize the money at present.

Very respectfully,

A. A. EUSTAPHIEVE, *Sec'y.*

THE WESTERN TRANSPORTATION COMPANY OFFICE,
Erie Basin, Buffalo, Dec. 21, 1860.

A. A. EUSTAPHIEVE, esq., *Sec'l'y Mutual Ins. Co.:*

We have your favor of yesterday covering a protested note of F. E. Phelps, of Detroit. Our understanding of the transaction referred to in your letter is, in substance, that the wheat was sold by the Buffalo Mutual Ins. Co., on the 12th day of November last past, to Mr. Phelps upon a credit of thirty days, and the note taken by your Co., in payment; and that, at the request and under the direction of your company, the wheat was delivered to and taken possession of by Mr. Phelps, under and in pursuance of that sale. How this can be construed into a sale "on account of the W. T. Co.," or "on account of the Mohawk," is more than we can understand. And we are equally at a loss to ascertain how you can be regarded as holding the note in question in trust for our benefit or otherwise. At all events we cannot recognize the existence of any state of facts which authorize the assumption in your letter. We therefore return the note to you, and beg leave to say that never having had anything to do with either the maker or indorser of the paper, we do not feel called upon to trouble ourselves in looking after their responsibility upon paper they have allowed to be dishonored.

Respectfully, yours,

(Signed) JNO. ALLEN, JR.

Exhibit No. 9.—Geo. Gorham, U. S. Com'r.

JNO. ALLEN, Jr., Esq., President:

I am in receipt of your letter, 21st, returning to me the note of Mr. Phelps, given for the sale of damaged wheat in pro. Mohawk, and am glad that it has only taken about six weeks for you to make up your mind that you had no right to said note, and that it will not take more than six weeks longer for you to come to the conclusion

that you have as much right to the sound wheat saved as you had to the note.

Your letter seems to contain an implied doubt as to the veracity of my statement as to the sale of said cargo. Whether you, seated over a comfortable fire in Buffalo, know more about it than your authorized agent, Mr. Bryant, and your captain, Pheatt, together, on the spot at Detroit, I beg leave to let you, gentlemen, settle the question amongst yourselves; all I have to say is, that what I wrote to you on 20th, as to what they informed me, is true, and I don't believe either of them will be rash enough to deny it.

Very respectfully,

A. A. EUSTAPHIEVE.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss*:

I, Geo. Gorham, a commissioner duly appointed by the Circuit Court of the United States for the second circuit and northern district of New York, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing deposition is, and the fact is, that the testimony of Robert A. Jones, George Dickson, William Dickson, and Alexander A. Eustaphieve is material and necessary in the cause, the title whereof is in the caption of said deposition named, and pending in the Circuit Court of the United States for the northern district of Illinois, and that the said witnesses lived at a greater distance than one hundred miles from Chicago, in the State of Illinois, the place of trial of said cause.

86 I further certify that on the 26th and 27th days of February, in the year of our Lord one thousand eight hundred and sixty-four, I was attended by John Hubbell, esq., counsel for the claimants, and by Rob't Rae, esq., counsel for the libellants, and by the witnesses aforesaid, who were of sound mind and of lawful age, and the witnesses were by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth; and their depositions were by me reduced to writing in the presence of the witnesses aforesaid, and from their statements; and after carefully reading the same to the witnesses, they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of sealing up and directing the same with my own hand to the court for which the same were taken; and I certify that the same will be retained by me until I shall deposit the same with my own hand, sealed up and directed as aforesaid, in the post office at Buffalo, New York, the place where the said depositions were taken. And I do further certify, that I am not of

counsel or attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof, I have hereunto set my hand, this eighth day of March, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States of America the eighty-eighth.

GEO. GORHAM,
United States Commissioner, &c.

On this day, to wit, the 20th day of July, A. D. 1865, came said libellants, by their proctor, and filed in said clerk's office their petition for an appeal, which said petition is in the words and figures following, to wit:

In the United States Circuit Court for the northern district of Illinois, in admiralty.

THE CHICAGO MARINE AND FIRE INSURANCE Company, David Dows, Ammi Dows, and John D. Muir, libellants and appellants,
vs.
THE PROPELLER MOHAWK, respondent, and the Western Transportation Company, claimants and appellee.

To the honorable the Supreme Court of the United States:

The petition of Joshua Barrell respectfully showeth: That on the 1st day of August, A. D. 1862, the above-named the Chicago Marine and Fire Insurance Company, and the above-named David Dows, Ammi Dows, and John D. Muir, filed their respective libels in the United States District Court for the northern district of Illinois, against the propeller Mohawk, her tackle, apparel, engines, machinery, &c., in two certain causes, civil and maritime, for the recovery of damages alleged to have been sustained by the said libel-
87 lants to a certain cargo of wheat at a time prior laden upon the said propeller, and by her to have been carried and safely delivered at Buffalo, in the State of New York; and that the said propeller was arrested upon process issued upon said libels, and was discharged on said claimant filing its claim and entering into stipulations and bonds; and the said claimant thereupon filed answers to said libels, and such proceedings were had on the respective causes that, on the 30th day of September, A. D. 1863, a final decree was made and pronounced therein by the said District Court, wherein it was in substance adjudged that the libels of the said libellants be dismissed with costs, and that said claimants have and recover against the said libellants the amount of the costs to be taxed in the said causes. And, after such final decree, your petitioner duly appealed therefrom to the United States Circuit Court for the northern district of Illinois, and the said causes were removed thereby into the said Circuit Court, and on the 23d day of October, A. D. 1863, the

said causes, by order of the said Circuit Court, were consolidated and made one, as in the title herein set forth; and at the time last aforesaid your petitioner, by order of said Circuit Court, was subrogated to all the rights of all the said libellants, and the said cause was there tried anew, and such proceedings were then had in the said Circuit Court, to wit, that afterwards, on the tenth day of July, A. D. 1865, the said Circuit Court made a final decree in said cause, whereby it was decreed that the said decrees of the said district court be in all things affirmed, with costs, and that the said claimants have execution for their costs to be taxed, which said decree of said Circuit Court is, as this appellant is advised, erroneons and ought to be reversed. Wherefore this your petitioner appeals from the whole of said decree of said Circuit Court to the Supreme Court of the United States, and respectfully prays that the said decree of the said Circuit Court, and the libels, answers, pleadings, depositions, evidence, and proceedings in said cause, be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said Circuit Court, and every part thereof, may be reversed, and a decree made condemning said claimants to pay and satisfy the damages aforesaid, with costs, or such other decree as to the said Supreme Court shall seem just.

JOSHUA BARRELL.

Indorsed: Filed July 20th, 1865. Wm. H. Bradley, cl'k.

On the same day, to wit, the 20th day of July, A. D. 1865, came said libellants, by their proctor, and filed in said clerk's office their appeal bond, which said bond is in the words and figures following, to wit:

88 United States of America, northern district of Illinois, in the Circuirt Court.

THE CHICAGO MARINE AND FIRE INSURANCE Company, David Dows, Ammi Dows, and John D. Muir, libellants and appellants, *vs.* THE PROPELLER MOHAWK, respondent, the Western Transportation Company, claimant and appellees.	In admiralty.

Know all men by these presents that we, Joshua Barrell, as principal, and John Stafford, as surety, of the city of Chicago, in the county of Cook and State of Illinois, are held and firmly bound unto the abovenamed the Western Transportation Company in the sum of one thousand dollars, to be paid to the said Western Transportation Company, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the nineteenth day of July, A. D. 1865.

Whereas the abovenamed appellants have prosecuted an appeal to the Supreme Court of the United States at the city of Washington, in the District of Columbia, to reverse the decree rendered in the adove-entitled cause by the United States Circuit Court for the northern district of Illinois: Now, therefore, the condition of this obligation is such that if the abovenamed appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make good their appeal, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[SEAL.] JOSHUA BARRELL.
[SEAL.] JOHN F. STAFFORD.

John F. Stafford, being duly sworn, deposes and says that he resides in the city of Chicago, and is worth the sum of one thousand dollars over and above all his just debts and liabilities.

Subscribed and sworn before me this 20th day of July, A. D. 1865.
Approved. THOMAS DRUMMOND.

Indorsed: Filed July 20th, 1865. Wm. H. Bradley, cl'k.

89 On this day, to wit, November twelfth, A. D. 1867, the libellant filed herein his petition for appeal, which is in the words and figures following, to wit:

In the United States Circuit Court for the northern district of Illinois, in admiralty.

JOSHUA BARRELL, SUBROGATED TO THE RIGHTS OF the Chicago Marine and Fire Insurance Company, David Dows, Ammie Dows, and John D. Muir, libellants and appellants,
vs.
THE PROPELLER "MOHAWK" RESPONDENT, AND The "Western Transportation Co., claimants and appellee.

To the Honorable the Supreme Court of the United States:

The petition of Joshua Barrell respectfully sheweth, that on the 1st day of August, A. D. 1862, the above-named, The Chicago Marine and Fire Insurance [Insurance] Company, and the above-named David Dows, Ammi Dows and John D. Mair, filed their respective libels
90 in the United States District Court for the northern district of Illinois, against the propeller "Mohawk," her tackle, apparel, engines, machinery, &c., in two certain causes, civil and maratime, for the recovery of damages alleged to have been sustained by the said libellants to a certain cargo of wheat, at a time prior laden upon the said propeller, and by her to have been carried and safely delivered at Buffalo, in the State of New York; and that the said propeller

was arrested upon process issued upon said libels, and was discharged on said claimants filing its claim and entering into stipulations and bonds; and the said claimant thereupon filed answers to said libels, and such proceedings were had on the respective causes, that on the 30th day of September, A. D. 1863, a final decree was made and pronounced therein by the said District Court, wherein it was in substance adjudged that the libels of the said libellants be dismissed with costs, and that said claimants have and recover against the said libellants the amount of the costs to be taxed in the said causes.

And after such final decree, your petitioner duly appealed therefrom to the United States Circuit Court for the northern district of Illinois, and the said causes, were removed thereby into the said
91 Circuit Court; and on the 23rd day of October, A. D. 1863, the said causes by the order of the said Circuit Court, were consolidated and made one, as in the title herein set forth; and at the time last aforesaid your petitioner, by order of said Circuit Court, was subrogated to all the rights of all the said libellants, and the said cause was therein tried anew; and such proceedings were then had in the said Circuit Court, to wit, that afterwards on the tenth day of July, A. D. 1865, the said Circuit Court made a final decree in said cause, whereby it was decreed that the said decree of the said District Court be in all things affirmed with costs, and that the said claimants have execution for their costs to be taxed, which said decree of said Circuit Court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore, this your petitioner appealed on the 20th day of July, A. D. 1865, from the whole of said decree of said Circuit Court to the Supreme Court of the United States, and respectfully prayed that the said decree of the said Circuit Court, and the libels, answers, pleadings, depositions, evidence, and proceedings in said cause be sent to the Supreme Court of the United States, and the said libels, answers, pleadings, depositions, evidence, and proceedings in said cause were so sent to the said Supreme Court of the United
92 States, on the day of December, A. D. 1865, and said appeal was duly perfected by the filing of said appeal in the clerk's office of said U. S. Supreme Court; that afterwards said cause being in said court a motion was made to dismiss said appeal on account of the want of a proper citation in said cause. And afterwards, to wit, at the December, term, A. D. 1865, in the month of February, A. D. 1866, said motion being heard, said citation was found to be defective, and said suit was dismissed for want of jurisdiction by reason of said defect.

Wherefore, this your petitioner again appeals from the whole of said decree of said Circuit Court to the Supreme Court of the United States, and respectfully prays that the said decree of the said Circuit Court, and the libels, answers, pleadings, depositions, evidence, and proceedings in said cause, be again sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said Circuit Court, and every part thereof, may be reversed, and

a decree made condemning said claimants to pay and satisfy the damages aforesaid with costs or such other decree as to the said Supreme Court shall seem just.

JOSHUA BARRELL.

Filed Nov. 12, 1867.

WM. H. BRADLEY, *Clk.*

93 And on this day, to wit, the twelfth day of November, A. D. 1867, there appears of record in said cause the following order, in words and figures, to wit:

Appeal.

THE CHICAGO MARINE AND FIRE INSURANCE Company, David Douse, Ammi Douse, and John D. Muir,
vs.
PROPELLER MOHAWK.

Now comes Joshua Barrell, subrogated to the rights of the libellant herein, by his proctor, who files his petition praying for an appeal of this cause to the Supreme Court; and on motion of said proctor. the prayer of said petition is granted, upon his giving a bond or stipulation in the sum of one thousand dollars, with John F. Stafford as surety to pay all costs upon said appeal.

94 And on this day, to wit, the twelfth day of November, A. D. 1867, the libellant files his appeal bond herein, in the words and figures following, to wit.

Circuit Court of the United States for the northern district of Illinois, in admiralty.

JOSHUA BARRELL, SUBROGATED TO THE RIGHTS of the Chicago Marine and Fire Insurance Co., David Dows, Ammi Dows, and John D. Muir, libellants and appellants,
v.
THE PROPELLER "MOHAWK," RESP'DT, AND Western Transportation Company, claimants and appellees.

UNITED STATES OF AMERICA:

Know all men by these presents, that we, John Barrell as principal, and John F. Stafford as surety, of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto the above-named The Western Transportation Company in the sum of one thousand dollars, to be paid to the said Western Trans-
95 portation Company, for the payment of which, well and truly

to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, and firmly by these presents. Sealed with our seals, and dated the day of November, A. D. 1867.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decision rendered in the above-entitled canse by the United States Circuit Court for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make good their appeal, then this obligation shall be void, otherwise the same shall be and remain in full force.

[SEAL.] JOSHUA BARRELL.
[SEAL.] JOHN F. STAFFORD.
Witness:
WM. H. COADON, *Notary Public.*

U. S. OF AMERICA, *Nor. Dist. of Illinois, ss:*

John F. Stafford, being duly sworn, deposes and says, that
96 he resides in the city of Chicago, State of Illinois, and is worth the sum of one thousand dollars over and above all his just debts and liabilities.

JOHN F. STAFFORD.

Subscribed and sworn to before me this 12th day of November, A. D. 1867.

[SEAL.] WM. H. COADON,
Notary Public.

Filed Nov. 12, 1867.

WM. H. BRADLEY, *Cl'k.*

97 [See page 46.]

98 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the Circuit Court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be, embracing ninety-seven pages of printed and written matter, to be a true and complete transcript of the record of all the proceedings had in the cause in said court, wherein The Chicago Marine & Fire Insurance Company, David Dows, Ammi Dows, and John D. Muir, are the libelants, and the propeller Mohawk is the defendant, as appears from the original of the same now remaining in my custody, Joshua Barrell having been subrogated to the rights of the libellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said northern district, this twenty-seventh day of November, A. D. 1867.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[5-cts. U. S. rev. stamp.]

99 By the Honorable David Davis, one of the judges of the Circuit Court of the United States for the northern district of Illinois.

JOSHUA BARRELL, SUBROGATED, &C., TO THE rights, &c., of The Chicago Marine and Fire Insurance Company, David Dows, Ammi Dows, and John D. Muir, appellant,

vs.

THE PROPELLER MOHAWK & THE WESTERN Transportation Company, claimants and appellees.

UNITED STATES OF AMERICA, *ss:*

To the propeller Mohawk, The Western Transportation Company, greeting:

Whereas Joshua Barrell, subrogated to the rights of The Chicago Marine and Fire Insurance Company, David Dows, Ammi Dows, and John D. Muir, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the Circuit Court of the United States for the northern district of Illinois, in the
100 seventh circuit, made in favor of you, the said the propeller Mohawk, The Western Transportation Company, against the said The Chicago Marine and Fire Insurance Company, David Dows, Ammi Dows, and John D. Muir, and has filed security required by law. You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Chicago, in the northern district of Illinois, in the seventh circuit, this 12th day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-first.

THOMAS DRUMMOND,
U. S. Judge.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Frederick F. Burlock, being duly sworn, saith that he served the claimants and appellees, The Propeller Mohawk and The
101 Western Transportation Company, on the fifteenth day of November, A. D. 1867, a copy of the citation filed in this cause with the clerk of the Circuit Court in and for the northern district of Illinois, by delivering a copy of said citation to William K. McAllister, esq., the proctor of the said appellee, The Propeller Mohawk, and also to J. W. Tuttle, agent of the said appellee, The

Western Transportation Company, personally, by delivering a copy of said citation to him at his office in the city of Chicago.

FRED'K F. BURLOCK.

Sworn to this 15th day of November, A. D. 1867, before me.

[SEAL] WM. H. CONDON,

Notary Public for the City of Chicago.

Endorsed: U. S. Circuit Court nor. dist. of Illinois. Joshua Barrell, subrogated, &c., appellant, *v.* The Propeller "Mohawk" *et al.*, appellee. Citation. Filed Nov. 15, 1867. W. H. Bradley, clerk.

Supreme Court of the United States,

December Term, A. D. 1868.

JOSHUA BARRELL, *Appellant;*

vs.

THE PROPELLER "MOHAWK," THE WESTERN TRANSPORTATION COMPANY, *Claimant, Appellee.*

No. 168.

POINTS AND ARGUMENT FOR THE APPELLANT.

BY SAMUEL W. FULLER.

Beach & Barnard's Steam Print, 122 & 124 Clark St., Chicago.

IN THE

SUPREME COURT OF THE UNITED STATES,

December Term, A. D. 1868.

JOSHUA BARRELL, *Appellant;*

vs.

THE PROPELLER "MOHAWK," THE WESTERN TRANSPORTATION COMPANY, *Claimant, Appellee.*

No. 168.

POINTS AND ARGUMENT FOR THE APPELLANT.

A decree having passed against the appellant in the District and Circuit Courts, he brings the case here, and presents for the consideration of the Court the following questions: Whether the loss of a cargo of wheat shipped on board a propeller, occasioned by the explosion of her boiler while navigating the great lakes, is, or not, a loss by "the dangers of navigation," and secondly, whether, if it is not, the right of action for damages can be assigned by the shipper or the insured so that the assignee can maintain a suit in admiralty, in his own name, against the party in fault?

The facts are, that on the 31st of October, 1860, there were shipped on board the propeller "Mohawk," at Chicago, for account of the Chicago, Marine and Fire Insurance Company, 10,000 bushels of wheat, to be trans-

ported to Buffalo for fifteen cents per bushel freight, "the *dangers of navigation*, fire and collision, *excepted.*" (Record page 3.)

Another shipment of 10,217, 45-100 bushels of wheat was made on the same vessel, on the same day, for account of David Dows & Co., of New York, and on the same terms. (See the bill of lading, Record 28).

The "Mohawk" left Chicago to prosecute her voyage to Buffalo, and grounded in the channel on the St. Clair flats, about the 1st of November, 1860, and while trying to get off and pass a schooner, the "Harriet Ross," also in the channel, her boiler exploded and occasioned a nearly total loss of the cargo.

(See Saunder's testimony, p. 15, the stipulation of the parties, page 21, folio 21, and the testimony of the master of the "Mohawk," H. D. Pheatt, pp. 45–6–7. He stated: "We were going out of the channel when the accident "occurred. Our vessel boiler exploded about two hours "after the boat had stranded, and it sunk, and the goods "were damaged." Page 47, folio 46.)

It is insisted that this explosion of the boiler was not a "danger of navigation," within the exception of the bill of lading.

This question must be settled before we proceed further in the argument, because, if there was no fault, there was no liability for damage.

The explosion of a steam boiler does not come within any of the definitions of the terms, "dangers of navigation" or "perils of the sea."

It is not a "danger" or "peril" incident to navigation, any more than the breaking of a chain or the fall of a mast or other stick of timber. It is presumed to occur from a

defect in the boiler. When a loss occurs, the burden of proof is upon the carrier to show that it was not through his fault. There is no such proof in the record. While the vessel, in calm weather, was trying to get off the place where it had grounded in consequence of trying to pass another vessel that was also aground in the channel, her boiler exploded, and this was the immediate cause of the loss, and must be presumed to have occurred by reason of the boiler being defective. No wind or wave occasioned it; it might as well have happened in a harbor, or while lying at the wharf, and cases hereafter cited, show that such an explosion would not excuse the carrier for non delivery of the cargo.

Bulkley v. *Naumkedg Steam Cotton Co.*,
24 Howard, 386, affirming the case,
The Bark Edwin, 1 Sprague, 477.

The respondent, having incurred a liability for the loss occasioned by the explosion of the boiler of the "Mohawk," the next question is, whether there has been a waiver or discharge of that liability, by the parties who suffered the loss?

The wheat was insured in the Mutual Insurance Company of Buffalo, by two certificates of insurance, one No. 738, for $10,000, payable, in case of loss, to J. Y. Scammon, President (of the Chicago Marine and Fire Insurance Company), (Record page 76, folio 75,) and the other, No. 742, for $9,600, payable, in case of loss, to D. & A. Dows & Co.'s order. (Record 77, folio 76.)

The Insurance Company has paid to the assured, or their order, the full amount of the insurance, (see the receipts,

pp. 76–7, folios 75–6), and was thus subrogated to the place and rights of the assured as against the respondent.

2 Parson's Maritime Law, 416,
The Monticello v. *Mollison*, 17 Howard, 155.
Garrison et al. v. *Memphis Insurance Co.*,
19 Howard, 317.

Upon receiving information of the disaster to the cargo, the agent of the owners of the wheat immediately abandoned it to the Insurance Company, which paid the loss to the owners.

See stipulation of parties, p. 41, folio 40.

Nineteen thousand and ninety (19,090) bushels of the wheat were delivered on the St. Clair flats and at Detroit to the agent of the Insurance Company; and eleven hundred (1,100) bushels were transported to Buffalo in good order, where the underwriters tendered full freight on the same, and all lawful charges, and declined to pay, either *pro rata*, or full frieght on the wheat delivered on the flats or at Detroit, but the respondents refused to receive the freight tendered, and still retain the eleven hundred (1,100) bushels of good wheat carried to Buffalo.

The parties having stipulated as to these matters, they are not open to discussion or dispute, as matters of fact; the legal effect of the transactions only remains to be considered.

The cargo was damaged and abandoned to the underwriters, who accepted the abandonment, and paid the loss to the insured; and the question is, whether, in making and accepting the abandonment, there was any waiver or discharge of the respondent's liability?

The fact of the abandonment of the cargo to the underwriters, implies that it has been damaged or lost, in whole or in part, and, generally, the burden of proof is upon the

carrier to show that the loss was not the result of his fault or negligence; but in this case, the cause of the loss is proved, and the carrier seeks to escape liability for that loss, by showing that the proceedings of the assured and underwriters, in making and accepting the abandonment, were such as to discharge him from liability for the loss occasioned by his fault or negligence.

The abandonment seems to have been amicably conducted, except so far as relates to the respondent's claim for freight.

John W. Strong was the agent of the Insurance Company at Detroit, and after he heard of the disaster to the propeller, he sold the cargo to F. E. Phelps, for twelve hundred dollars, as it lay on the flats, and the master of the "Mohawk" and Mr. Bryant, *managing agent of the claimant*, the Western Transportation Company, assented to it, as too good a sale "to be lost," and said they "would "recognize it as a sale for the benefit of all concerned" (folios 16, 18, 19).

(See also the testimony of Phelps, the purchaser, folios 19-20, and the stipulation, folios 21–22, and the testimony of Capt. Pheatt, folios 46–47.)

Thus it appears that the agents of the Insurance Company and the claimant, together with the master of the propeller, assented to several things immediately after the disaster: first, the abandonment of the cargo in a damaged condition to the underwriters; secondly, the sale and delivery to the purchaser, of 19,090 bushels, part of the damaged cargo, for $1,200, and the transportation to Buffalo of the rest of the cargo, 1,100 bushels; while they were unable to agree as to the freight claimed to be due to the propeller, and, as Capt. Pheatt states (folio 46), concluded to let the sale be consummated, and "let the freight be "an after consideration."

The respondent claimed freight on that portion of the cargo delivered to Phelps on the St. Clair flats, and in Detroit, which the Insurance Company refused to pay; the 1,100 bushels transported to Buffalo were demanded of the respondent, and full freight tendered for it, but the respondent refused to deliver it unless it was also paid the *pro rata* freight on that part of the cargo delivered on the flats or at Detroit, and it never has delivered it to any body, and a portion of the damaged cargo, say six or seven thousand bushels, was carried to Buffalo by the respondent for Phelps, the purchaser, who paid five or six cents per bush. freight to Buffalo from Detroit (Capt. Pheatt's testimony, folios 45–6).

In all these transactions, there is nothing more than an endeavor to save as much as possible from the damaged cargo, for the benefit of all concerned, with a claim for freight by the respondent, denied by the Insurance Company, and left for future adjustment.

Somebody had sustained a loss of nearly twenty thousand dollars by the fault of the carrier, for which he was liable; and the claim for freight earned and not paid, might be a fair and legal deduction from the amount for which he was liable, but could not operate as a discharge of that liability, unless it was equal in amount, which is not pretended, for the whole freight to Buffalo would have been but about $3,000, while the loss on the cargo, as shown by the sale at Detroit, was nearly $18,000, as compared with the sum insured at Chicago, to say nothing of the cost of insurance and *pro rata* freight, which, if earned, should be added to the value of the cargo when damaged.

It can scarcely be pretended, that this sale of the damaged grain was intended by the parties to be a satisfaction of the claim of the insured upon the carrier for the loss occasioned by his negligence.

It was the right and duty of the respondent to transport the cargo to Buffalo, according to the terms of the bills of lading, in order to earn and become entitled to freight; but the disaster to the propeller, whereby the wheat was wet and damaged, rendered it necessary and proper for all concerned, to join in saving as much of it as could be; and that action on the part of the Insurance Company, neither entitled the respondent to full freight, nor released it from liability for loss occasioned by its negligence.

The right to demand freight, and the right to recover damages for losses occasioned by the fault of the carrier, were mutual, independent rights, not waived or relinquished by either party.

The Insurance Company having paid the loss for which it was liable, assigned its claim against the "Mohawk" to the appellant, by the following endorsement upon the certificates of insurance:

"For and in consideration of one dollar, the Mutual "Insurance Company of Buffalo does hereby assign to "Joshua Barrell, all their right, title, and interest in the "within certificate of insurance, with all choses in action "accruing to it, or for its benefit, by reason of said policy.

"A. A. EUSTAPHIEVE,
"*Sec'y Mut. Ins. Co. of B.*"

"Dated, Buffalo, July 1st, 1862." (Record 77, folio 75.)

A like endorsement was made on the other certificate of insurance. (Record 78, folio 76.)

It is insisted, or was, in the courts below, that these assignments were void as against the statutes of New York, prohibiting assignments of any part of the effects of monied corporations, unless sanctioned or authorized by the board of directors; and it was also claimed that the assignment to Barrell was champertous, and therefore void.

The circumstances attending the assignment are fully stated by Eustaphieve in his testimony, pp. 71 to 76, folios 70 to 75, and the most material of them are the following:

that the Buffalo Mutual Insurance Company, or at least its agent Eustaphieve, knew nothing of "the circumstances of "the explosion and stranding" of the 'Mohawk' until Nov. 1863, long after the Company had paid the loss and made the assignment to Barrell (folio 74), and, acting in ignorance of the facts concerning the loss, the Insurance Company declined to sue the owners of the "Mohawk," and made the settlements with the assured, and conducted the transactions with the owners of the "Mohawk," and Atwater, acting for Barrell, while possessed of no other information about the loss than what was stated in the vessel's protest (folio 74); that Atwater paid the Buffalo Insurance Company $2,300 or $2,400 for its claims against the owners of the "Mohawk," and took an assignment of them to Barrell, the appellant, folio 71, (Atwater was the agent of the Insurance Company at Chicago,) and a majority of the executive committee of the Buffalo Insurance Company authorized the sale and transfer (folio 72); the order or authority for making such sale and transfer, being the following resolution:

"OFFICE OF THE MUT. INS. CO. OF BUFFALO,
"*June* 28, '62.

"IN COMMITTEE.

"*Resolved*, That the Secretary be hereby authorized to "sell any and all claims this Company may have *vs.* the "Pro. Mohawk, for and in consequence of the sinking "and damaging a cargo of wheat on board of said vessel "on St. Clair flats, in the fall of 1860, reserving the claim "now in suit to the said wheat delivered at Buffalo.

"The condition and consideration of the above sale to "be one thousand dollars, to be paid to this Company by "said purchaser.

"E. S. HAZARD,
"S. K. WORTHINGTON,
"A. A. EUSTAPHIEVE,
"M. P. BUSH,
"*Executive Committee.*"

(Record, p. 85, folio 84.)

× and knew the circumstances of the loss, and had corresponded with the B. M. Ins. Co. about it.

We insist this order or resolution was sufficient authority, even under the statutes of New York, for mak ing sale of the claims to Barrell or Atwater, for all the officers of the Company usually concerned in making such transactions for the Insurance Company were consulted, and sanctioned it (folios 71, 2-4-5).

But the assignment was not void within the statutes of New York, according to the decisions of the courts of that State.

Eno v. *Crooke*, 10 New York, 66.
Warner v. *Chappell*, 32 Barbour, 309.
Elwell et al. v. *Dodge et al.*, 33 Barb., 336.

If any irregularity occurred in making the assignment, none but the corporation, its creditors or stockholders, can take advantage of it; and besides, the State laws cannot control the rights of parties and the rules of practice in the admiralty courts, which regulate their own proceedings by systems of laws peculiar to themselves.

By paying the loss to the assured, the Buffalo Insurance Company was subrogated to their rights of action against the carrier, and having assigned its claim thus acquired to the appellant, the latter may maintain a suit in admiralty in his own name against the carrier.

The Boston, 1 Blatch. & Howland, 316.
The George, Olcott, 93.
Swett et al. v. *Black et al.*, 1 Sprague, 579
Cobb v. *Howard, et al.*, 3 Blatchford, 524.
Fretz et al. v. *Bull et al.*, 12 Howard, 466.

"I am satisfied that an assignee of a chose in action may "maintain a suit, in his own name, in the admiralty."
Judge SPRAGUE, 1 Sprague, 580, *supra*.

"It is every days practice in the admiralty, to allow suits "to be brought in the name of the assignee of a chose in "action."

Judge NELSON, 3 Blatchford, 524.

This is a full statement of the case prior to the commencement of the present proceedings, which have been as follows:

The Chicago Marine & Fire Insurance Company, one of the parties for whose account the wheat was shipped on board the "Mohawk," commenced a suit in admiralty against the propeller, on the 1st day of August, 1862, counting upon the bill of lading hereinbefore referred to (pp. 1–3, folios 2–3).

The propeller "Mohawk" was seized under process issued in that cause, and bonded by the claimant, the Western Transportation Company, which filed its answer Oct. 8th, 1862, denying all liability for the loss, and insisting upon the dealings with the cargo at the St. Clair flats and Detroit, as an acceptance of the wheat under such circumstances as entitled the carrier to full freight, for which it claimed judgment (pp. 7–12, folios 7–13).

On the same day that suit was begun, Aug. 1st, 1862, another was commenced by Dows & Co. against the same respondent, upon the bill of lading issued to them, and the like arrest of the "Mohawk," and claim and answer of the Western Transportation Company was made in that case, as in the former (pp. 25–36, folios 25–37).

The same testimony was taken and offered in both cases in the District Court, and after a hearing both libels were (on the 30th Sept., 1863) "dismissed without prejudice, at the costs of the libellants" (folios 23 and 47).

Appeals were immediately prayed and allowed to the Circuit Court in both cases, and duly perfected on the 12th Oct., 1863 (folio 49).

The suits had been begun and thus far prosecuted in the names of the owners of the wheat, to whom the bills of lading were issued, but on the 23d of Nov., 1863, the appellant filed his petition in the Circuit Court, stating that he was the owner of the claims in suit, by purchase and assignment, from the Buffalo Mutual Insurance Company, and prayed to be admitted as the *dominus litis* in said causes (p. 50, folios 49–50).

On the same day it was on motion ordered, that "the "two causes be consolidated, and that Joshua Barrell, the "appellant, be subrogated to all the rights of the libel-"lants, and that he have leave to file an amended libel" (p. 51, folio 50).

He filed an amended libel the same day, setting up the foregoing proceedings, and the order admitting him to prosecute the suits (pp. 51–2, folios 50–2).

On the 1st day of Dec., 1863, the claimant filed its answer to the amended libel (folios 53–58).

In the amended answer, the claimant admitted, in the fifth article (folio 53), that "the propeller became disabled "by *bursting* her boiler, and then and there sunk with the "said cargo on board"; in the seventh article it admitted that the 1,100 bushels of wheat were never delivered, because its claim for freight was not paid; and again insisted that the proceedings of the parties interested in the wheat at the St. Clair flats and Detroit, gave the owners of the propeller a right to full freight upon the whole cargo (folio 56); and finally, in article fifteenth, insisted that the sale and assignment of the matters in controversy to the appellant was for a mere nominal consideration, not

exceeding $2,500, and was made without authority, by the Secretary of the Insurance Company, after that Company had decided not to prosecute the claim (folios 57–58).

The cause was heard upon these pleadings, and further proofs taken in the Circuit Court; and on the 10th of July, 1865, the decree of the District Court was affirmed, and the libels dismissed at the costs of the libellant (folios 59–60).

On the hearing in the Circuit Court, the libellants offered the testimony of John M. Sitts (folios 60 and 61), and the respondents offered the testimony of Robert A. Jones, George Dickman and William Dickson, to show the difficult nature of navigation on the St. Clair flats, and the opinions of said witnesses as to the proper way of navigating a vessel over said flats under different circumstances. But they do not seem to approve the mode of navigation adopted by the master of the Mohawk, nor is their testimony material.

It further appears, from the testimony of Joseph L. Weatherby, that after the suits were begun in the District Court, the Buffalo Mutual Insurance Company was advised of their pendency, and declined to do any act or take any step to the prejudice of the parties in interest, who were prosecuting said suits, (see folios 63, 64 and 65,) and had no wish to "repudiate the sale of the claim for loss by explosion, on the propeller Mohawk." (Folios 64 and 65.)

In December, 1861, the Buffalo Insurance Company sued the Western Transportation Company, in the Superior Court of Buffalo, for non delivery of the 1157 bushels of sound wheat saved from the damaged cargo of the "Mohawk," which suit was defended, and a stipulation

made by the counsel for the parties, as to the evidence and the facts upon which the case should be tried, but as it was never tried, and finally dismissed, upon the settlement or sale of the claim against the carrier to the appellant, who was no party to the suit, it does not seem to be of any importance on the trial of this cause.

(The record and stipulation in the suit at Buffalo, will be found in the record, pages 78 to 87, folios 77 to 85.)

Upon the decision in the Circuit Court being announced, an appeal to this Court was prayed, but the appeal was dismissed at the December Term, 1865, because the Circuit Court had not allowed the appeal.

Barrel v. *Transportation Company*, 3 Wallace, 424.

The present appeal was prayed and allowed, Nov. 12th, 1867. (P. 93, folio 93.)

It is believed that the foregoing is a full and correct statement of the facts, and all the proceedings in this case, and the following propositions and authorities show that the decree of the Circuit Court was erroneous and ought to be reversed:

I.

The explosion of the boiler of the Mohawk was the immediate cause of the loss, and was not a "danger of navigation" within the exception of the bill of lading, and the carrier is therefore liable for the damages caused by such explosion.

"Perils of the sea denote natural accidents peculiar to "that element, which do not happen by the intervention "of man, nor are to be prevented by human prudence.

"It is a loss happening in spite of all human effort and "sagacity."

3 Kent, 216,
Story on Bailments, (Ed. 1863) Secs. 511 to 525.
The Reeside, 2 Sumner, 567.
Garrison et al. v. *Memphis Ins. Co.*, 19 Howard, 312.
Bulkley v. *Naumkeag Steam Cotton Co.*, 24 Howard, 386.

In the case last cited, the loss was caused by the explosion of a steam boiler. The case was first heard in the District Court of Massachusetts, and reported in 1 Sprague-477, under the name of the Bark Edwin, and must be re, garded as decisive of the question in this Court.

New Jersey Steam Navigation Co. v. *Merchant's Bank*, 6 Howard, 344.
Angell on Carriers, Sec. 166, (Ed. 1868.)
Blythe v. *Marsh*, 1 McCord, 360.
Jones et al. v. *Pitcher & Co.*, 3 Stewart and Porter, 155, 176.
Backhouse v. *Snead*, 1 Murphey, 173.

II.

There having been an abandonment of the cargo to the underwriter—the Buffalo Mutual Insurance Company—the latter was subrogated to the rights of the shipper against the respondent, and might maintain any appropriate action in admiralty to recover damages for the loss, either in its own name or that of the owners of the cargo.

2 Parsons' Maritime Law, 372, 416.

The Propeller Monticello v. *Mollison*, 17 Howard, 155.

Garrison et al. v. *Memphis Insurance Co.*, 19 Howard, 317.

The Brig Ann C. Pratt, 1 Curtis, 343.

In the present case, the suits were begun in the names of the owners of the cargo, and after they had appealed to the Circuit Court, the appellant was subrogated to their rights and places, as the *dominus litis*, he being the owner of the claim by purchase and assignment from the Insurance Company. These proceedings were regular, and warranted by the thirty-fourth admiralty rule of this Court, as construed and applied in the two cases last cited, and sanctioned by the cases of

Newell v. *Norton and Ship*, 3 Wallace, 267.

These considerations seem to withdraw the case from all effect or control of the New York statutes relating to assignments.

III.

The sale of the cargo on the St. Clair flats and at Detroit, by or for account of the underwriters, did not release the respondent from liability for the damage done to it by its negligence.

The parties disagreed about each others claims and liabilities for freight, but all of them thought the sale a good one, and postponed the settlement of the freight until the cargo, in whole or in part, had reached its destination. The respondent's just claims for freight may be set off against the amount of damages for which it is liable, but such an acceptance or disposition of the wheat was not a legal discharge of its liability for the loss occasioned by its negligence. The acceptance was not a voluntary, but a compulsory act, to save the most of the damaged cargo for the benefit of all concerned.

The real controversy here, is not about the freight, but whether, if the respondent had occasioned a loss to the owners of the wheat, their claim for damages was waived or discharged by the sale of the damaged cargo, under the circumstances shown in the record ?

1 Parsons on Maritime Law, 167.

The Ann D. Richardson, 1 Abbott's Admiralty Reports, 499.

Miston v. *Lord*, 1 Blatchford, 354.

Vlierboom v. *Chapman et al.*, 13 Meeson and Welsby, 230, and note to American Ed. 240.

Abbott on Shipping, 430, side.

Rogers et al. v. *West et al.*, 9 Indiana, 400.

See Chitty on Carriers, 200, and following pages, side and notes.

Angell on Carriers, Sections 407 and following.

Smyth v. *Wright*, 15 Barbour, 51.

Atlantic Insurance Co. v. *Bird et al.*, 2 Bosworth, 195.

Richardson et al. v. *Young et al.*, 38 Penn St. 169.

The Nathaniel Hooper, 3 Sumner, 550.

Caze et al. v. *Baltimore Ins. Co.*, 7 Cranch, 362.

IV.

As to the effect of the laws of New York upon the assignment to Barrell, it is insisted that it *was* made substantially, if not technically, by the Directors or Executive Committee of the Buffalo Mutual Insurance Company, and "that none but the corporation, or its stockholders or credi-"tors, can impeach a transfer of property by the corpora-"tion, for the want of the previous action of the board of "directors, and then only by direct action brought for that "purpose."

Eno v. *Cooke*, 10 New York, 66.
Warner v. *Chappel*, 32 Barbour, 309.
Elwell et al. v. *Dodge and others*, 33 Barbour, 336.

Finally, the law subrogated the Insurance Company to the rights of the owners of the damaged cargo, and under a mistake as to the circumstances of the loss, in ignorance of the fact that the boiler exploded, the Insurance Company sold, for $2,300 or $2,400, to the appellant, a claim which it regarded as worthless, and after suits had been brought in the names of the owners of the cargo, the Court, for economy and convenience, allowed the two suits to be consolidated, and the real owner of the claim to be admitted to prosecute the suit. In this there was nothing unlawful or champertous; nothing but was sanctioned in *Cobb* v. *Howard et al.*, 3 Blatchford, 524, and as Judge GRIER said in the case of the *Propeller Monticello* v. *Mollison*, 17 Howard, 155: "The respondent is not presumed to know, or bound "to inquire, as to the relative equities of parties claiming "the damages. He is bound to make satisfaction for the "injury he has done. When he has once made it to the "injured party, he cannot be made liable to another suit at "the instance of any merely equitable claimant. If notified

" of such a claim before payment, he may compel the " claimants to interplead; otherwise, in making reparation " for a wrong done, he need look no further than to the " party injured. If others claim a right to stand in his " place, they must intervene in proper time, or lose their " recourse to the respondent.

" The insurer may at all times intervene in Courts of " Admiralty, if he has the equitable right to the whole or " any part of the damages. Under the 34th rule in admi- " ralty of this Court, he may be allowed to intervene and " become the *dominus litis*, where he can show abandon- " ment, which devests the original claimant of all interest. " See 1 Curtis' R. 340. " Under the 43d rule also, he may " intervene after decree, and claim the damages recovered, " by showing that he is equitably entitled to them. But " with all this, the respondent has no concern, nor can he " defend himself by setting up these equities of others, " unless he can show that he has made satisfaction to the " party justly entitled to receive the damages."

SAMUEL W. FULLER,
For Appellant.

ROB'T. RAE,
Of Counsel.

CHICAGO, January 7, 1869.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1868.

JOSHUA BARRELL,
Appellant,

vs.

PROPELLER MOHAWK; THE WESTERN TRANSPORTATION COMPANY, CLAIMANT,
Appellee.

No. 168.

POINTS AND ARGUMENT FOR THE APPELLEE.

C. BECKWITH,
Of Counsel for the Appellee.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1868.

JOSHUA BARRELL,
Appellant,

vs.

PROPELLER MOHAWK; THE WESTERN TRANSPORTATION COMPANY, CLAIMANT,
Appellee.

No. 168.

POINTS AND ARGUMENT FOR THE APPELLEE.

On the 31st day of October, 1860, the owners shipped on board the propeller Mohawk, at Chicago, two consignments of spring wheat, amounting to 20,217$\frac{4}{5}$ bushels, to be delivered at Buffalo in good order and condition, dangers of navigation excepted, upon payment of freight and charges. The property was insured by the Mutual Insurance Company of Buffalo. The propeller proceeded on her voyage, and after the same had been more than half completed, was, without fault of her officers

or crew, grounded on the St. Clair Flats. In the effort to get her off she became disabled by the bursting of her boiler, and afterwards sunk, and was compelled to suspend her voyage for a few days to make necessary repairs.

The disaster occurred on the 7th of November, 1860, near Detroit. All the wheat but eleven hundred (1100) bushels was damaged by the sinking of the propeller. Upon information then given to the consignee and insurers at Buffalo, the agent of the owners of the wheat immediately abandoned it to the underwriters as for a total loss, and the latter then accepted the abandonment and paid the loss to the owners as for a total loss.

On the 11th of November, 1860, the underwriters ordered their agent at Detroit to sell the cargo of the propeller; the agent thereupon sold the damaged portion of it to one Phelps for $1,200, and took his note therefor. The next day (the 12th) the agent reported the sale, and on the 13th received a telegram from his company acknowledging the advices, and approving thereof. After the sale had been consummated, the company gave their agent a further direction not to sell, as there appeared to be some difficulty about the question of freight. The agent states that thereupon he saw the agent of the propeller and informed him he should cancel the sale if freight was insisted on; the agent of the propeller then expressed the opinion that the sale was too good to be lost, and said, "We will recognize it as a sale for the benefit of all concerned as acting for us." The damaged portion of the cargo, amounting to 19,090 bushels, was afterwards delivered by the propeller to Phelps, and the balance of 1,100 bushels was retained on board and carried by the propeller to Buffalo, where it arrived before the close of navigation.

Afterwards, on the 1st August, 1862, the Chicago Marine and Fire Insurance Company for whose account parcel of the cargo had been shipped, although they had abandoned and had been paid for the loss by the underwriters, libeled the Mohawk in the District Court for the Northern District of Illinois, claiming damages for breach of contract of affreightment.

And on the same day, David Dows & Co., for whose account the other parcel of the cargo had been shipped, who had also abandoned and been paid their loss, filed another libel against the propeller, claiming damages for breach of a like contract. Answers were afterwards filed, proofs were taken, and on hearing in the District Court the libels were dismissed. At the October term, 1863, the libellants took their appeal to the Circuit Court. On the 23rd October, 1863, Joshua Barrell presented his petition to the Circuit Court, stating that on the 1st of July, 1862, the underwriters had assigned their interest in the cargo to him, and that he was equitably interested and entitled to intervene and have the benefit of both of the above libels. On this petition the Circuit Court consolidated both causes, and made order that Barrell be subrogated *to all the rights of the libellants*, and that he have leave to file an amended libel.

On the 23rd of November, 1863, Barrell filed his amended libel, alleging the shipping of the cargo on board the Mohawk; that the propeller left port *in good and seaworthy condition*, and that after the voyage was more than half completed she was carelessly grounded on the St. Clair Flats. He also alleged the abandonment, and claimed that the underwriters had suffered damages on account of the injury to the wheat, as well as for the non-delivery of the 1,100 bushels detained by the propeller; and that he, as assignee of the insurance company, was entitled to recover therefor.

To this libel answer was made, denying the alleged negligence in grounding the vessel; admitting the non-delivery of the 1,100 bushels of wheat, and claiming to hold it for freight; both that earned on the wheat actually delivered at St. Clair Flats, and on the said 1,100 transported to Buffalo; the abandonment was also admitted; the assignment from the insurance company was denied; and the character of that transaction set forth with allegations, in substance, that it savored of *maintenance*. The substance of this answer was also proved.

Afterwards, at the July Term, 1865, the appeal came on to be heard before the Circuit Court, and upon the pleadings and evidence the libels were dismissed with costs, from which decree Barrell has taken this appeal.

Upon the pleadings and evidence the following questions rise:

1. Whether the appellant has a standing in court.

2. Whether the sinking of the vessel was caused by negligence.

3. Whether the appellees can retain the 1,100 bushels of the cargo until paid, not only the freight thereon, but also the *pro rata* freight earned on the damaged portion of the cargo delivered to Phelps.

I. As to Barrell's standing in court.

First. The original libels were filed in the District Court for breach of contract by parties once interested in the cargo as owners, but at the time of filing the libels having no interest; they had previously abandoned the cargo to the underwriters, who had accepted of the abandonment and taken possession of and sold the greater part of the cargo, and had paid the loss to the owners. The right of action was therefore in the insurers, and not in the original libellants, at the time the libels were filed in the District Court. In those libels the interest of the insurers was not represented, nor any decree demanded respecting it. Upon hearing in the District Court the libels were dismissed. After the cause reached the Circuit Court on appeal, Barrell filed a petition therein to be subrogated, etc., upon which the court made its order, consolidating both libels, and directing that he be subrogated to all the rights of the libellants therein; and also giving him leave to file an amended libel. Barrell then filed his amended libel, claiming an interest, etc., as assignee of the insurers, and in right of them to recover.

The order of subrogation gave Barrell no better right to prosecute the suit than the original libellants had; which was no right whatever. The libel filed by him in the Circuit Court, so far as it stands on the assignment from the insurers, was an original libel in right of the only party entitled to sue, when suit was brought; and so far as it partakes of the character of an original libel, the Circuit Court did not obtain jurisdiction of the matters therein set forth.

The only party to bring suit could not for the first time be brought before the Circuit Court by amendment on appeal. Barrell, by subrogation, acquired merely the *status* of the original libellants. His interest as assignee of the insurers was not brought before the Circuit Court in such manner as to permit a decree in his favor. *Houseman* v. *Sch'r N. C.*, 15 Pet. pp. 49, 50. As *dominus litis* he was lord of nothing. As assignee of the insurers he should, *quoad hoc*, have filed his libel in the District and not in the Circuit Court.

It is said to be a universal rule that all rights, claims and interests which are indissolubly connected with the property insured, pass to the insurers by an abandonment of the property, so far as the same belonged to the assured, and to the extent of the interest covered by the policy; as right to contribution for general average; all claims for negligence or any misconduct causing injury to the property, as for collision; or for injury to goods or for indemnity from a foreign government.

2 Parsons Marine Ins., pp. 194—196, and the cases there cited.

In this case, the abandonment was perfect before the original libels were filed, and the whole right to satisfaction for breach of the contracts had passed by operation of law, by force of the abandonment, to the underwriters, who in courts of admiralty or of equity have the right to sue in their own names, and to recover therefor. The original owners were thereby divested of all interest before suit brought. And herein, this case is distinguished from the case of the *Brig Ann C. Pratt*, 1 Curtis, 340, and other cases cited by the counsel for the appellant, where the abandonment was accepted by the underwriters *pendente lite*.

Second. Barrell's standing in court is that of a volunteer purchasing and prosecuting a claim which his alleged assignor declined to prosecute or insist upon; and, indeed, the extent and nature of which, as now set forth, appear not to have been known to the insurers at the time of the alleged assignment, nor until long after. The assignment did not transfer a legal title, and has merely an equitable operation. In considering the *locus standi* of the assignee, equitable considerations will therefore govern. The assignment savors of *maintenance;* the right thereunder is claimed by a volunteer; and in a court of equity the appellant would not, for these reasons, be entitled to relief.

Ward v. *Van Bokkelen*, 2 Paige, 289.

And in such a case, where a court of admiralty is called on to aid a party standing upon an equitable right, it will follow the rules of equity, and deny relief.

Brig Ann C. Pratt, 1 Cur. 342.

II. But if Barrell, as assignee of the insurers, is properly in court, still the merits of the case are against him.

In right of the insurers, he makes two claims:

(1.) To have damages for injury to the cargo by the sinking of the propeller.

(2.) To have the 1,100 bushels retained by the propeller, or the value, upon paying the freight earned on that parcel only.

1. The appellees, if without fault, are protected against the first claim by the bill of lading, exempting them, in cases of injury, from dangers of navigation.

In this case, the *immediate* cause of damage was the sinking of the vessel; the vessel was sunk by the explosion of its boiler; the boiler exploded in an effort to set afloat the grounded vessel: and the vessel was grounded in the channel of the St. Clair Flats, without fault of its officers or men.

By the stipulations of the parties, pp. 21, 40, as well as by appellant's libel, it is admitted that the propeller left port *in good and seaworthy condition;* and it appears that she continued in the successful prosecution of her voyage until she was grounded on the St. Clair Flats. Nothing had occurred, in the meantime, to disturb the good and seaworthy condition in which she set out on her voyage. This admission applies as well to the condition of the boiler as to any other part of the vessel at the time of leaving port; and, as nothing is shown to have subsequently occurred to render the boiler defective, it is manifestly wrong for the appellant *to presume*, without proof, that the explosion occurred from a defect in the boiler. The appellant is bound by his admission, and cannot, as the evidence stands, dispute that the boiler was in good condition.

Parfitt v. *Thompson*, 13 Mee. & W. 392.

The vessel was grounded without fault of its officers or men. The evidence on this subject consists of the testimony of the appellant's witnesses, Sanders, Sitts, and Dickman, pp. 15, 61, and 69 of record; and of appellee's witnesses, Pheatt, the master of the propeller, and Jones, pp. 45 and 67; and, on the whole, is conclusive that there was no negligence or fault in this regard.

2. The appellees resist the second claim of the appellant, on the ground that they are entitled to retain the 1,100 bushels of wheat, not only for the freight due thereon, but for so much *pro rata* of the freight on the damaged parcel as had been earned at the time of its sale.

The insurers sold the damaged wheat to Phelps on the 11th November, 1860, and on that day gave him a bill of sale, and requested the propeller to deliver the property at the St. Clair Flats; they then took his note for the price. The sale was then completed, and the purchaser invested with title as against the insurers. Not until the 13th was any question raised concerning the freight; and then nothing was done by

the insurers, and could not be, to cancel the sale; on the other hand, the agents of the vessel did nothing to waive right to the freight *pro rata* earned on the property sold. The underwriters, at the time of sale, had the title by abandonment; they voluntarily exercised dominion over it, by making a sale and directing a delivery at that point to the purchaser, and received the price agreed upon; then their dominion ended; and when, two days afterwards, the agent of the insurers was instructed to cancel the sale, the agent of the vessel expressed the opinion that the sale was too good to be lost. But notwithstanding this, the propeller retained the 1,100 bushels not damaged, and transported it to Buffalo. Under these circumstances, it has a lien on the same for freight thereon, and for freight *pro rata* on the damaged portion of the cargo.

Abbott on Shipping, marg., pp. 434, 435, and Notes, 8th Ed.

Flanders on Shipping, § 552 to 555.

The rule on this subject stated by these writers, and sanctioned by adjudication, is, that freight will be apportioned when the ship, by reason of disaster, goes into port, and is unable to complete the voyage; in such case, the master may, by reshipping, entitle himself to the whole freight; but if he does not do so, and the goods are received by the consignee, the general rule of the maritime law is, that freight shall be paid according to the proportion of the voyage performed *pro rata itineris peracti*. The same rule obtains where the cargo is abandoned to the underwriters, and in whole or in part is sold by them at an intermediate port.

Smyth v. *Wright*, 15 Barb. 51, and cases there cited.

C. BECKWITH,

Of Counsel for the Appellee.

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, A. D. 1868.

JOSHUA BARRELL,

vs

PROPELLER MOHAWK, The Western Transportation Co. *Claimants.* } No. 168.

Reply to Hon. C. H. Beckwith's Argument for Appellee.

ARGUMENT AND POINTS OF ROB'T RAE, FOR APPELLANTS.

The facts are so fairly and conscientiously stated by my learned associate, Mr. Fuller, in his printed brief, that the Court is in possession of all the material circumstances upon which appellant contends for a decree, that I shall not recite them, but simply content myself by making reference to so much of them as will enable me to reply to the Appellee's points and arguments.

The Appellant's standing in Court is made the first subject of inquiry by the Appellee.

It is contended upon this point, that by virtue of the order of subrogation, the appellant had no better right to promote this proceeding than the original libellants had when they filed their libel in the District Court, "Which was no right whatever."

Did the Court mean by this order of subrogation to limit the appellant to only such rights as the original libellants had in their own right at the time of filing their libel, and not to such rights which they as *dominus litis* rightfully represented in court?

Did the order thus alter in a double sense, and did it idly say that as the original libellants have no rights, it is solemnly ordered that the petitioner be made lord of these?

But is it true that the libellants had no right at the time they filed their bill to prosecute the suit, and could the respondents have defended on that ground?

First then as to the meaning of the order, and afterwards as to the libellants right to sue.

It is conceded that appellant took by the order all the rights the original libellants possessed at the time of filing their libel.

The order was intended to be co-extensive with the rights set forth in the petition and was but a formal way of granting the Prayer of the petitioner.

At folio 125 of the Record, we find that Joshua Barrell filed his petition in the Circuit Court, on the 23d day of November, 1863, stating that the libellants were at the time of the disaster mentioned in their libel, insured in the Mutual Insurance Company of Buffalo, upon the wheat mentioned in said libel. That the Insurance Company had paid the loss and that the property being abandoned to the company they had accepted the abandonment, and on the 1st of July, 1862, the Insurance Company

for a valuable consideration assigned the claim to petitioner, who was at the time of filing the petition the bona fide holder thereof, and entitled to all choses of action accruing to the Insurance Company, by reason of the payment of the loss, &c. And concludes with a prayer that the Court would make an order admitting petitioner as the *dominus litis* in said cause, and to intervene for his interest therein according to the 34th rule in Admiralty, &c.

Under the rules of practice here was an opportunity for the appellees to traverse all the material facts set forth in the petition, and to make objection to the prayer. They declined to do so, and there being no objection to the prayer of the petitioner and the facts stated in the petition not being traversed by the respondents, the court *without objection* ordered that the prayer of the petition be allowed, and no exception is taken to *any part* of the order.

This order is not now subject to review.

Jackson *vs* Montgomery,
18 How. 111.
Commander in Chief,
1 Wal. 269.

When an order is made and no formal objection or exception appear on the record, it will be presumed to have been done by consent, and the irregularity is waived.

The Pizarro, 2 Wh. 227.

The order having then been made without objection, and therefore by consent the only question is, to what rights was the petitioner admitted. To only such as the libellants at that time possessed in their own rights, or *en autre droit*. It was the intention of the court to allow the prayer of the petitioner. That pe-

tition disclosed that the original libellants had no longer any equitable right, but simply by virtue of the Bill of Lading, the legal right. It was then not an order that the petitioner be subrogated to the equitable rights of the libellants, for *they had none*, but their legal rights. It was by force alone of the equitable rights having passed to the petitioner from the libellant, that the petitioner was made lord of the legal right. In law, equity and admiralty, the equitable right may reside in one party, and the legal right in another, and when the respondent consented that Barrell should be subrogated to the libellants legal right, it was an acknowledgement of his equitable right as bona fide holder of the choses in action, as is set up in the petition, and they ought equitably to be estopped from any farther questioning such equity. By the order thus made by consent, that he was a *bona fide* holder became and was *res adjudica*. If they desired to dispute the equity of the petitioner, they should have traversed the petition, and put in issue whether he was the *bona fide* holder of the demand sued on, this they failed to do, but consented that the petitioner had such equity, and made no objection to the order predicated upon the verity of the facts it contained. The record then shows that at the time Barrell filed his amended libel in the case he was admitted by consent to be the *dominus litis*, and the equitable owner of the demand, so that he was subrogated to the legal rights of the libelants and held in himself the equities. To aid the appellees the court must decide that the party holding the legal interest in the cause of action cannot with the consent of the *cestui que trust* maintain the suit in his name, nor can the *cestui que trust* maintain suit in the name of the party having the legal interest, but that the party having the equitable right must sue in his own name. It is true the language of the Court sometimes is that the assignee of the chose in action in Admiralty may sue.

Fritz *vs.* Bull, 12 How.

The question has usually arisen where the party holding the

equitable interest has sued and the objection taken has been that the party holding the legal interest can alone sue: but no where does the law say the party holding the equitable interest alone must sue. On the contrary when the question directly arose in the case of the Propeller Monticello, (17 How. 155,) the Court disapproved of such a doctrine. In reference to the case of the Ann C. Prett (1 Cur. 342,) a distinction is attempted to be made by the appellee's proctor between it and the case at bar, because the abandonment in the case of the Ann C. Prett was accepted *pendente lite*, while in this case it was made before suit was brought. But Judge Curtis in delivering the opinion which compelled the order of subrogation, expressly discountenances such a distinction, and shows that if it was placed upon that ground, the party could not intervene. He says, "In the absence of any direct authority it would seem to be quite clear that a Court of Admiralty no more than a Court of Equity must take notice of mere voluntary assignment of the subject in dispute *pendente lite*. It cannot suffer its proceedings thus to be encumbered or affected." He then goes on to show that the claim of the Insurance Company to be subrogated was not of such a character. He says, "It is not mere voluntary assignment *pendente lite*, the policy was underwritten, the disaster occurred, and the right of abandonment existed in point of law before the suit was begun. It relates back to the time of the disaster, and clothes the underwriter with all rights which at that time belonged to the owner." It would introduce a multitude of collateral issues, if the party having the legal interest in a written contract could enquire when a dispute arose as to its breach into the equities existing between one of the contracting parties and third parties, and escape liability through a litigation as to rights which they are not called on to defend or in no way concerned.

It is answered that the Court by the order never intended to put a barren sceptre into the hand of the appellant but to clothe him with all the rights which the libelant possessed either in his

own right or as the representative of others, and secondly that the party possessing the legal interest may sue in his own name for a breach of the contract, and the wrong doer cannot defend the wrong he has done by starting an inquiry into the relative equities existing between the actor and the parties, and that the equitable holder of a chose in action may use the name of the party having the legal interest in a suit in Admiralty without that fact furnishing a good defence to the wrong doer.

Newell *vs.* Norton & Ship,
3 Wal. 267.

The second point made by appellee is that the assignment to Barrell of the 1100 bushels of wheat in *esse* and the damage done to the balance of the wheat by the Transportation Company, savors of maintenance, that it is a volunteer purchasing and presenting a claim which his alleged assignee declined to prosecute or insist upon; and the extent and nature of which as is now set forth, appear not to have been known to the insurers at the time of the alleged assignment, nor until long after.

By the abandonment of the wheat to the Insurance Company by the shipper, the Insurance Company became the owner of the property, and although in the possession of a wrong-doer this could not defeat the sale by the rightful owner. This was expressly decided in a case of abandonment by Judge Story, (*Brig Sarah Ann*, 2 Sum. 211), and the case is approved by this court in *Tome vs. Dubois*, 6 Wal. 554. The Insurance Company assigned and sold all their interest in the property to Barrell, which consist d of 1100 bushels of wheat in a perfectly sound condition, and the damaged wheat. (Folio 187.) Such a sale is not a sale of a right of action, but a sale of the property itself.

Tome vs. Dubois, ibid.

If Barrell, after he became the owner of the wheat was compelled to sue, it was because the defendants wrongfully refused

to deliver the property or to make satisfaction for the injury they had done. They are the *cause* of the litigation, and can they defeat it on that ground? In the language of this Court in the case quoted, "such a defense of a wrong-doer is not entitled to any special favor."

Nearly forty years have elapsed since *Ward vs. Van Bokkelen* was decided, and the courts of the United States, and in England from which the doctrine is derived, has since permitted the holder of a right to dispose of it in such a manner as to enjoy its full value. The free amotion of all kinds of property is now encouraged. The civilization, or rather barbarism, which made the legislation of England on this subject necessary, commencing with the statute of Westminster (1 ch. 28), and ending with 32 Henry VIII. (ch. 9), has happily now passed away.

In England the law of maintenance had its foundation in the existence of a class of nobles, who, by their great power and influence could overawe the courts and pervert the course of justice.

But in this country, where no aristocracy, nor any privileged class, elevated above the mass of the people, has ever existed, there would seem never to have been any good reason for the prevalence of that law.

Influenced by the legislation on this subject, statutes were passed at the commencement of our governments re-enacting the English statutes, but the genius of our commercial inclinations was such that they are nearly all repealed, and independent of statutes every vestage of the old common law of maintenance has disappeared, (4 Kern. 289, 18 Barb. 473), and the case of *Ward vs. Van Bokkelen* was overruled upon principal in *Sedwick vs. Stanton*, and made bad law by the repeal of the statute upon which it was decided.

2 Rev. Stat. of N. Y. 691.

In England now, as we have said, the law is the same as our own.

Master *vs.* Miller, (47 R. 320.)

J. Buller says, "It is laid down in our old books that for avoiding maintenance a *chose* in action cannot be assigned. The good sense of that rule seems to me to be very questionable, and in early as well as modern times it has been so explained away it remains at most only an objection to the form of the action in any case."

The Insurance Company and the Transportation Company are both corporations existing by virtue of the laws of the State of New York, and as such subject to its laws. The assignment was good by the laws of that State, and the assignment was made in that State.

Maintenance, in its general sense, as defined by the old law, is now no longer unlawful, and the doctrine does not prevail in the United States, except in one or two States. In the State where this transaction occurred it is lawful both by the statute laws of the State (except in a few enumerated cases) and the decisions of her highest courts.

The doctrine of maintenance never did prevail in the civil law, which is the parent of the admiralty law, and the assignee had the same benefit from pawns and hypothecations to which the assignor was entitled.

Dig. 18, 4, 6, 14, 23.
Warkoenig jus. Rom. Priv. vol. 2 § 443, 444.

As to the suggestion thrown out that the Insurance Company declined to prosecute the claim, it is not true. They only were misadvised as to the extent of their claim—they were in litigation as to a part only. They were advised by their counsel that they could discover no proof of negligence so as to charge the whole amount of the loss to the Transportation Company.

The agent of the assignee of the claim acted in the "perfectest good faith." He, before the transfer, communicated all his knowledge and learning on the subject to the Insurance Company, and contended explosion was not a danger of navigation. He furnished the authorities to sustain his view, and they were all laid before the Insurance Company's counsel, who advised differently, (pp. 189,190), and thought the authorities inapplicable. It is true the Company was ignorant of the facts which Jerry Saunders testifies to, and there is no evidence tending to show that Barrell (p. 191) was any better informed. All they knew was what the protest contained, that it was a loss by explosion, but *when* they were fully informed by Saunders' testimony *on file* in perfect fairness, they were offered the opportunity to annul the assignment, they declined to disturb it. (Pp. 168, 170, 171). Could anything be more fair?

The respondent, having acknowledged the receipt of the cargo in good order, and their obligation to deliver it in like good order, the *onus* is on them to show that they have complied with the obligations of their contract.

1 Black., 157, 19 How., 165, 166, 172.
12 How., 280.

That they have complied with the terms of their original undertaking they do not pretend, but attempt to excuse themselves, first, by claiming that the property, except 1100 bushels, was voluntarily accepted, part on the St. Clair Flats and part at the port of Detroit, by the agent of the libelant; and, secondly, that the damaged cargo was made so by a danger of navigation.

I.

They claim they delivered the property on the Flats and at Detroit, at the libelant's request. This of course means a *safe*

and true delivery. If they did so, there could be no loss of the the property, as alleged.

As to the 1100 bushels, this will not be contended, for they still hold possession of it on a claim for full freight and charges, and also for the whole of the *pro rata* freight, due on that which was sold at Detroit.

As to the wheat at Detroit, the abandonment of it to the underwriter did not constitute an acceptance of the wheat of the carrier, the underwriter became simply the assignee of the bill of lading, and subrogated to the right of the shipper, and as such had a right to demand of the carrier, the performance of his contract.

The sale of the wheat to Phelps did not *per se*, have any greater or other effect than to make him the like assignee of the Insurance Company.

The order given by the master, at Strong's request, to deliver the wheat, and the consequent delivery, had not been interfered with, and this "was the be all and end all here," would have undoubtedly constituted such acceptance of the wheat, but whether voluntary or not depends upon circumstances.

Before delivery, however, Strong notifies the master that he will cancel the sale if the Transportation Company insist upon freight, and tells the captain his instructions from his principal. It is then arranged that the sale "shall stand, not for the benefit of the Buffalo Mutual, but for the benefit of all parties in interest, as a sale made by the Western Transportation Company.' Pp. 35, 36.

Strong could make no other arrangement. As agent of the Insurance Company his authority was limited by the telegram, and the extent of that limitation was known to the master. The master did not abandon his claim for *pro rata* freight, nor have

the Western Transportation Company, as they still hold the 1100 bushels for it. So that the case stands simply that upon the wheat being damaged, the master of the propeller sold it and remitted the proceeds to the Insurance Company.

The master is not authorized to accept the cargo at an intermediate port, so as to charge the owner with a *pro rata* freight. And if he sells the cargo, and the shipper lays claim to the proceeds, this does not amount to a voluntary acceptance on his part.

1 Parson's Maratime Law, p. 167
and Notes 2 and 3.
Ann D. Richardson, Abbott R. 499.

Strong says that he followed the instructions contained in the Secretary's telegram, which was not to touch the wheat unless master abandoned claim for freight, and to tell him if he wanted freight to carry it to Buffalo. The captain did, and now does, demand freight, and, as a consequence, was instructed to carry it to Buffalo. Instead of this, he sold it. Is this a voluntary acceptance of the wheat at Detroit? And was he not bound, when so instructed, to carry it to Buffalo, according to the requirements of his bill of lading?

Eustaphieve's testimony taken by the respondent shows that the master and the agent of the boat so understood, that the sale was made not by the Mutual Insurance Company, but the master, for they both called on Mr. Eustaphieve, to whom Phelps' note had been forwarded by Strong, and claimed it as belonging to the Western Transportation Company, and Eustaphieve agreed to hold in trust for the Western Transportation Company's use. Pp. 188, 189. Neither Bryant, the agent of the Company, nor Pheatt, the master, was ever called to contradict or modify Eustaphieve's statement.

If Mr. Eustaphieve's statement is true, then the master of the propeller sold the wheat and has never accounted to the shipper for the proceeds.

The delivery at Detroit must be as to a rightful delivery, precisely the same as it should have been at Buffalo, and the terminus of the adventure.

A cargo delivered in a damaged condition is not delivery within the meaning of the bill of lading, except it is damaged by a sea peril; and rightful delivery is a condition concurrent with the right to collect freight. There is no presumption of a voluntary acceptation short of the place of destination. The law presumes that the shipper or consignee selects a market and desired them to be transported to the place designated in the bill of lading.

The acceptance must be a voluntary acceptance, where the carrier is the author of the tort, to constitute a delivery, and mere acceptance is not satisfaction for the damage.

Angel on Carriers, 305.

It is contended, then, on the part of the libelant that there was not a delivery of 1100 bushels, now in the possession of the respondents.

That the sale of the damaged wheat at Detroit, was made, not by the Insurance Company, but by the Western Transportation Company, and the delivery to the vendee was a delivery by them.

That there was no delivery, according to the terms of the bill of lading, either at Detroit or Buffalo, which required a safe delivery.

That the acceptance of Phelps' note did not constitute a voluntary acceptance of the cargo, and that an acceptance *in invitem*, at an intermediate port, is not an excuse for non-delivery at Buffalo, and the libelant has a just claim for compensation for his loss, by reason, *First*, the injury done to his goods. *Second*, for non-delivery at Buffalo, although the Court should find he

was bound to receive them in a damaged condition at a port short of that place. *Third*, that he never did receive them at Detroit, or on the flats.

The second excuse is that the property was destroyed "by a peril of the sea."

The answer does not set up that the explosion took place in consequence of the stranding, nor is there any nesessary connection between stranding and explosion, and unless it is alleged that the explosion was the consequence of stranding, the Court will not infer it. Neither is it recognized that the only or best way to get a stranded boat off the bottom is to blow her off.

If explosion is not the natural result of stranding or of attempting to get a stranded boat free, and explosion is not a danger of navigation, then the proximate cause, which was explosion, was not a danger of navigation, and the *onus* is still on the respondent to show that the damage was occasioned or produced by a sea peril. * *

But the stranding was a negligent act.

It appears that at the time the propeller broke for her voyage she was in good and seaworthy condition, and remained so until the night of the 1st of November, 1860, when, in passing over the channel of St. Clair Flats, and when near to St. Clair Lake, met with the schooner H. Ross, which was lying across the channel, at anchor. When within six hundred feet of the schooner, the master of the propeller was cautioned by Jerry Saunders not to attempt to go round the Ross, but to go *slowly* down against her stern, and push her out of the way. ~~Pp.~~ 32, 33.

Fol.

Jerry Saunders is an old and experienced pilot, who was not only acquainted with the piloting of steamboats across these flats, but who had carefully surveyed them and made a chart, which is regarded as a good one, and in use by masters on the

lakes. Indeed, it is the only one in use. He is also engaged in locating range lights to guide vessels in the night time.

The master of the propeller does not contradict Saunders, but says he does not remember it, and that he "did not take his advice," whatever that advice was. P. 114.

The master, however, admits the attempt to go round her a dangerous one—one in which there were doubts. Pp. 113, 114. He admits the propeller was heavily loaded—that in the night time it is difficult to tell just how fast his boat is going when running under a check, and it does not appear that he slowed or took any precautions, after he had made up his mind to attempt what he was doubtful of succeeding in, and in making the attempt he stranded.

To strand upon a well-known shallow, is like an attempt to sail on dry land, and is never regarded as a danger of navigation.

Whitesides *vs.* Russell, 8 Watts & S., 44.

The propeller was in the artificial part of the channel, which is made by dredging, so that there are banks on either side of the channel, (p. 113), and the channel resembles a river; and within the spirit of the act made to protect property from the careless navigation of rivers by steamers, the act provides "when from darkness, fog, or *other cause*, the pilot on watch shall be of an opinion that the navigation is unsafe, the vessel shall be brought to anchor, or moored," and, in case the person in command, shall, after being so admonished, elect to pursue such voyage, he may do so, but in case of loss shall be answerable for all damages which shall arise, etc.

Act 30 Aug., 1852, (10 Stat. 72.)

Expert testimony is called by the defense to show that Jerry Saunders, who was present and most capable of judging, was mistaken, and although the event verified Saunders' opinion, yet

against his opinion, given on the spot and the result—come they to testify.

The first question to Captain Jones puts the channel as *completely* obstructed, and his reply is, that he would attempt to get by her by going under the vessel's stern, and that under these circumstance it would not have been safe to have run down against the vessel lying across the channel, with a view of moving her out of the way, and that at 600 feet from the obstructing vessel he would have taken no steps to run the propeller on the bank. The questions do not state the case truly—the true state of the case is, *First*, That the channel was not *completely* obstructed, but that there was not sufficient room for the propeller to go under the vessel's stern without great danger of grounding, and that the schooner lay at anchor and was not aground—and whilst it would not be good seamanship to go against any immovable obstruction, or one that could not be easily moved out of the way, yet if it could be removed with great care and with a slight effort, surely such a temporary and removable obstruction could not justify a vessel, in the night time, in running at full speed on shore. "She so obstructed the channel," says Pheatt, "as to impede our passage, but I thought I could go round her stern, and I tried to do it."

Capt. Dickinson is next called, and he is asked what would be the consequence of attempting to *suddenly* stop the propeller, navigating the St. Clair Flats in the night time. Now as libelant has not contended that she should be *suddenly* stopped, but that she should only be slowed, there is no issue with the respondent; yet the only reason why she should not be suddenly stopped the witness tells us, is in the fear that the vessel would go aground. I cannot see what benefit the respondents can derive in making some movement which *might* make her ground, and making some other movement that was *sure* to make her ground.

The witness says it is better that she should ground than

that a collision should occur. This is no doubt so, if grounding was less disastrous than a collision, but it does not prove that by going slowly down and attempting to push the schooner's stern out of the way that a disastrous or dangerous collision would have occurred.

To the 4th interrogatory as to "running against the vessel with a view of pushing her out of the way," he says, "it would not be good seamanship in the night time, because you cannot tell the exact location of the vessel, or how fast she is moving." Yet in the case at bar Pheatt tells us that although he saw the vessel some distance off, that he could not tell her "exact position until within 600 feet of her," so that Pheatt did know when within 600 feet of the schooner its exact position, and the first part of the reason fails. As to the second, that he could not tell how fast he was moving, this is easily disposed of by the dropping of the lead, (see Wm. Dickinson, the Rep. *ex parte* testimony,) or by backing, besides there is no evidence that the night was dark, or that they could not see how fast they were going. The danger, he tells us, is of doing the vessel some damage, and also of getting aground. But which danger was the greatest he does not tell us, and he gives us the same reason why it was good seamanship to run her aground, because if she let go an anchor there was danger of her going aground—as if it were far better to have disastrous reality or certainty, than a chance of escaping.

Wm. Dickinson, the 3d expert's testimony, is open to the same objection, and the last inquiry, as to letting the propeller heavily loaded, go down with the current and without the *use* of machinery, would not apply, for Saunders' proposal to go down slowly under a check, and as a consequence, slower than the current, and with the use of machinery.

The theory of experts is always objectionable, unless the question is propounded upon the finding of the Court—for if the Court should find the *facts* different from that which is stated to

the expert, the expert's testimony is valueless. When it is remembered the kind of care a master must take of cargoes intrusted to him, who can say that in this instance he was not careless? Prop. Niagara, (21 How. 7.) Did the stranding "happen in spite of human exertion, and which could not be prevented by human skill and prudence?"

The Act of Congress of July, 1838, providing against injuries to property from the escape of steam, makes such fact *prima facie* evidence, sufficient to charge the defendant or those in his employment, with negligence. What then becomes of the appellee's position that there is no evidence of negligence? The statute makes explosion *prima facie* evidence of such negligence, and the respondents have never called a single witness to explain or justify the cause of the explosion. No evidence is offered to rebut the presumption of negligence made by the statute. In view of this statute, it is difficult to perceive how anyone can contend that explosion is a danger of navigation. Who ever heard of a danger of navigation, that is, a *vis major*, with the presumption of human negligence attached to its occurrence? But upon general principles explosion is not a danger of navigation.

Explosion is not a danger of navigation.

The carrier is responsible for damage occasioned by explosion, negligence or no negligence. Explosion is not a danger of navigation. It is as common on land as on sea. The *danger* of locomotive carriage certainly does not include explosion, nor would the exemption from the dangers of any business be regarded as including explosion of steam boilers. The breaking of a mast by reason of a force which the master might control, would certainly not be a danger of navigation; the breaking of a mast by the wind would be, because the winds are of God. But the breaking of any tackle to which the master or agent applied and regulated the force, this would not be regarded as a danger of navigation; that is, a danger growing out of human

infidelity and unskillfulness in the application of a passive and servile force. He who may, if he please, apply one horse power to a piece of mechanism, will be held responsible for applyi nga greater power, if the event prove that the power applied was disproportionately superior to the capacity of the object to resist. There is no better illustration than this affords. We will take it for granted that the steam engine is properly constructed. When the temperature in the boilers is 342 degrees, the expansive power is 120 pounds to the square inch, which is regarded as the limit of safety with common western boilers; and every time 40 or 50 degrees of heat are added, the expansive power is doubled. Four hundred and seventy-two degrees of heat produce 525 pounds of pressure, which is regarded as the point of unavoidable bursting of common western boilers. Boilers are now gauged at about 96 pounds, of the best and most skillful manufacture; that is, the safety-valve is so adjusted, that, with a pressure of 96 pounds to the square inch it will rise and let the steam escape. The rule for ascertaining the strength of boilers, is to multiply twice the thickness of the boiler-iron, in inches, by sixty thousand, and divide the product by the diameter of the boiler, in inches. The quotient will be the utmost which a perfect boiler, made of the best iron, will bear to the square inch. But it should never be used with but one-fourth of this. The gauge-cock will always indicate with sufficient certainty to the practical engineer, the height of the water in the boilers. That by means of the gauge-cock and safety-valve the engineer knows the limits of safety.

It may be safely asserted that nothing is a danger of navigation which arises from an inherent and internal cause. Human ingenuity cannot devise an injury in this way which is not a common peril.

An axle-tree breaks on a smooth road—this is evidence of internal and latent defect. A piston breaks—a railroad bridge falls—ropes break by chafing—a vessel springs a leak without any adequate sea peril producing it—all these are not dangers

of navigation. They may occur with or without navigation or locomotion. To allow an interpretation so broad, would be to allow all dangers that beset travel to be dangers of navigation, and so exempt the carrier from all liability, except negligence. This would be against public policy.

In Rothchild's case with the Royal Mail Packet Co., (7 Ex. 740,) Sir A. Cockburn says, "Now it is well established that perils of the seas mean perils arising *from* the sea, and not merely perils *on the sea*." See also, Angel on Corporations, vol. 1, p. 176.

The implied guaranty is, that the vessel will not, in any way, injure the goods. It extends as much to the engine and boilers as the spars—all are machinery used in the navigation of the vessel. If it was stated to the shipper that, in addition to all the inevitable accidents happening from external causes, his cargo was to be at the risk of the inherent vice of the vessel itself, he would as lief ship in a *torpedo*, or be towed by a *rocket*.

The implied warranty is, that she shall be so tight and strong as to resist not only her wear and tear, but that she shalll resist all the ordinary perils of the sea; and it is only in the extraordinary and superior perils, over which man and intellect have no control, that the shipper is willing to exempt the carrier from the responsibility of safe delivery. The carrier's property in the carrier's possession and control, that has injured the shipper's property, and the shipper's property is without fault. It is so injured in consequence of a force which the bailee has put there; the plainest justice requires that the carrier shall make compensation.

Pouget, in his late excellent work on Marine Insurance, tells us that "we make a distinction between cases which are called *interior* cases, and those which have received the name of *exterior* facts—the latter are the storm, the running foul, the stranding, etc. Generally, in this case, the accident is considered in-

evitable. The report of the master is believed until the contrary is proven; but when an *interior act* is under consideration, the presumption of a proper vice, for instance fire, the event takes a different character—the captain has to prove that the accident has happened independent of him." (M. L. Pouget, Avocat, Prin de Droit Maritime, vol. 1, p. 96.

The risks included in a general exception are *ejustem generis.*

In loss occesioned by a *vis major*, the carrier is in no fault, and, therefore, should not pay. The case at bar is one in which the carrier is in fault and ought to pay.

The law will not, by argument or implication, class cases, where the carrier ought to pay, with those where he ought not to pay. To do so would be to introduce a new peril, with different and opposite equities—annexing a dissimilar peril to a group of similar and coincident perils.

Fire, upon this principle, is held not to be included in the general term "dangers of navigation," nor any loss presumed, *a priori*, to proceed from negligence.

The necessity for the use of the boiler in steam navigation, can have no weight. It is necessary that there should be fire to heat the water in it, yet fire is not a danger of navigation. If heated coals are not, it is difficult to see why heated metal is.

The case is equally clear upon authority. In *Laconi vs. Drury et al*, (8 Ex. 166,) the bill of lading contained the ordinary exception contained in English bills of lading, viz: "The act of God, the Queen's enemies, fire, and all and every other danger and accident of the seas, rivers and navigation, of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted."

The question in that case was whether damage by rats, falls

within the exception, and Ch. Baron Pollock, who declared the opinion of the Court, held that it does not. The Court say: "The only part of the exception under which it possibly could be contended to fall, is as "a danger or accident of the sea or navigation," but this, we think, includes only a danger or accident of the sea or navigation properly so called, viz: one caused by the violence of the wind and waves, (a *vis major*,) acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea or navigation, nor arising directly from it; but one to which such a commodity as cheese is equally liable in a warehouse on land, as in a ship at sea."

The United States Supreme Court, in following this decision, say: "The principle of these cases (N. J. S. N. Co. *vs.* Merchants' Bank, 6 How. 344 and 381; Hale *vs.* N. J. S. N. Co., 15 Conn. 539; Singleton *vs.* Hilliard, 1 Strab. 203; Gilmore *vs.* Carman, 1 S. & N. 79,) establishes a liability against a carrier, for a loss by fire, arising from other than a natural cause, whether occurring on a steamboat, accidentally, or communicated from another vessel, or from the shore. *And the fact that fire produces the motive power of the boat, does not affect the case.*

Gainson et al. *vs.* Memphis Ins. Co.,
19 How. 315.

The case of the barque Edwin (24 How. 389,) was a case where the agreed state of facts showed that the damaged part of the cargo, which consisted of bales of cotton, was so be carried a short distance by steam. The steamer upon which it was carried, after she had arrived at the side of the barque, and before any part of the 100 bales was taken out, exploded her boiler, in consequence of which the 100 bales were thrown into the water, and the lighter sunk. The Court were of an opinion that the vessel was bound for the safe shipment of the whole 707 bales of cotton, the quantity contracted to be carried. The only question before the Court was, whether or not a vessel may be

liable in a suit *in rem*, for the loss or damage done to merchandise never received on board." It was conceded that if they had been so shipped, then a loss by explosion was not a loss from a danger of navigation. But this premise was suppressed. That had been disposed of in the same case and acquiesced in, in the court below.—1 Sprague, 477. The argument is an enthymeme. See, also, Steamboat New World, 16 How. 469.

It would matter very little to the learned proctor, or his client, whether the goods were on shipboard or not; whether there was an actual or constructive delivery, if the bill of lading excepted the danger of explosion. The proposition was: "This is a loss by explosion, for which the vessel is liable, but the goods were not actually shipped, and this circumstance releases us." The Court say, this is a loss by explosion, for which the vessel is liable, and the fact of the goods not being actually shipped makes no difference. You are liable for explosion, whether the goods are aboard the vessel or the lighter. It was necessary to affirm the first proposition, before the second rose to the dignity of a question. The pleadings in this case will be found in the Appendix to 2 Vol. Parsons' Maritime Law, and the opinion as delivered in the case is reported in Sprague's decision, p. 477, where it is held that "explosion is not a danger of navigation."

We cannot yield to the argument, say the Supreme of Connecticut, "that common carriers are not responsible when the loss arises from the producing agent of the propelling power." Again, the same learned Court say: "By the act of God, is meant something superhuman, or something in opposition to the act of man."

Hale *vs.* N. J. S. T. Co., 18 Conn. 544.

Chief Justice Sharkey (Smeade & M. 305,) in reply to the point urged by counsel that the exception from fire should be interpreted as being included with dangers of navigation, where

the boat was a vessel obtaining its propelling power from the use of fire, says: "Suppose the exception in the bill of lading is entitled to a more extended meaning, and that there are dangers in navigating the river which fall properly within the exception, which will not be reached by the law, still we find nothing to justify us in saying that the danger of fire is one of that character. It is not a danger which proceeds from, or is peculiar to, the river. It arises from the means used in propelling the boat, and not from any obstacle or impediment in the river. The boat itself is the depository of the agent which produces its own destruction. If the owner chooses to employ this agent, he cannot with propriety, say it is the production of danger incident to the navigation of the river. This is a danger produced by human agency; it may be counteracted by human sagacity and prudence. The vessel itself may be constructed so as to be free from danger, or if not, prudence in keeping up a sufficient watch affords a guaranty for safety.

Hence, we conclude that a loss by fire does not fall within the exception of the bill of lading."

The pertinence of this able argument, to the question under consideration, is so obvious that time ought not to be consumed in making the application.

The Act of Congress, of July, 1838, providing against injuries to property from the escape of steam, makes such fact *prima facie* evidence sufficient to charge the defendant, or those in his employment, with negligence. This statute is, although in its nature penal, in fact but declaratory of the law. Can any court, by construction, extend the meaning of the words "dangers of navigation," so as to include a subject matter which is reprobated by the laws of Congress?

Next as to claim for *pro rata* freight.

The acceptance of the cargo, or of the proceeds of the sale of

the cargo, does not, *per se*, constitute a voluntary acceptance, such as to create a claim for freight *pro rata itineris*. If the cargo could have been reshiped, then it was the duty of the propeller to have reshiped it, (which the master never offered to do.) If it was in such a condition as required it to be resold at the intermediate port, then it could not have been carried forward, and there could be no *pro rata* freight due, for *pro rata* freight is founded on the captain's right of detention to carry forward and earn freight, *a fortiori*, there could be no *pro rata* freight due, when the damage was occasioned by the carrier's wrong.

When a vessel is injured and disabled by a sea peril, *and without any fault or negligence* on the part of those in charge of the vessel, and it is unable to complete the voyage, the master is at liberty to refit his own vessel, if that can be done within a reasonable time, or may hire another vessel or otherwise forward the goods to their destination. The master has no right to any freight if the goods are not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject. To extend the benefit of this law to the respondent, the carrier must be without fault or negligence; if, by his own wrong, he has placed the goods in this predicament, he cannot retain the goods to refit his vessel. He has proven himself an unworthy and unskillful bailee, and the warranty of this, on his part, having been broken, the shipper is entitled to the cargo without delay, or other inconvenience.

Chitty on Carriers, 201.

The objection that the parties have been paid by the underwriters cannot prevail to defeat this action.

Fritz *vs.* Ball, 12 How. 469.
Propeller Monticello, 17 How. 152.
Gaines et al. *vs.* Memphis Ins. Co.
19 How. 312.

DAMAGES.

The libelant alleges that, by reason of the loss, he has sustained damage to the amount of $20,218. The value of the wheat is admitted in the answer.

No freight is due, and, therefore, no freight can be deducted.

The proof of this damage is conclusive. The captain of the propeller sold the wheat, and, therefore, is estopped from denying that it was worth more than he obtained for it. He also declares it to be too good a sale to be lost.

The respondents have acknowledged the receipt of our wheat in good condition, of the value of $20,218, and never delivered it, or accounted for any portion of it.

The libelant, therefore, claims his actual damage, $20,218, with interest aforesaid.

ROBERT RAE,

Proctor of Appellant.

S. W. FULLER, *Advocate.*